

A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*

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INTRODUCTION

As almost anyone alive during the past decade knows, this is the era of the "litigation explosion,"¹ or there is at least the perception that a litigation explosion exists.² Although all agree that the absolute number of lawsuits has increased in virtually every corner of the state and federal court systems, there exists vigorous debate about whether the increase is unusual in relative or historical terms³ and even more vigorous debate about whether the absolute increase in cases symbolizes the American concern for fairness and justice⁴ or represents a surge in frivolous or trivial disputes needlessly clogging the courts.⁵ As the debate has

1. See, e.g., Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38 [hereinafter Bok] (arguing that larger proportion of lawyers and lawsuits in America as compared to other industrialized countries such as Japan suggests too much American reliance on the courts and too much adversarial contentiousness in American dispute resolution); Bok, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231, 233 (1974) (former solicitor general and federal judge argues that courts are increasingly used because of "self-defeating effort to guarantee every minor right people think they ought ideally to possess"); Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982) (former Chief Justice argues that courts are overburdened because aggrieved parties turn to courts for redress when they previously turned to other, more apt, institutions such as church and family); Pike, *Why Everybody Is Suing Everybody*, U.S. NEWS & WORLD REP., Dec. 4, 1978, at 50; *The Chilling Impact of Litigation*, BUS. WK., June 6, 1977, at 58 (claiming that litigation increase is of crisis proportions and unduly restricts business enterprises from socially useful activity); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 631 (1987) [hereinafter *Plausible Pleadings*] ("Responses to the litigation explosion, including the amendment of rule 11, reflect a widely held view that increased use of the courts is a negative development."). See also Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977) (author coins term "hyperlexis" to describe increased resort to courts for failure of or inability to obtain satisfaction through other political and social institutions, arguing that if not checked, hyperlexis will "drag our whole legal system into the ground."); *Everybody Must Get Sued*, NAT'L L.J., Sept. 14, 1987, at 47. (Mississippi state court trial judge dismisses tort claim in verse parodying Bob Dylan song "Rainy Day Women Part I," e.g., "everybody must get sued" in lieu of "everybody must get stoned").

2. See Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) [hereinafter Galanter] (arguing that the suggestion of a litigation "crisis" is unwarranted, that current per capita litigation activity is not unusual in American history, and that no evidence exists to support the suggestion that an increased number of court cases lack merit or are disadvantageous to society as a whole).

3. See Galanter, *supra* note 2, at 47-53 (referring to historical records showing a greater relative number of lawsuits in colonial America than at present, and describing a cyclical historical pattern in American resort to courts).

4. See Radhert, *Of Impressionists and Rohrschbach Blois* (Book Review), 86 COLUM. L. REV. 177 (1986) (in reviewing L. FRIEDMAN, *TOTAL JUSTICE* (1985), author reads Friedman as suggesting that increased litigation results from an expansion of rights and remedies, a generally positive development, rather than from an increased litigiousness or failure of other social institutions); Fiss, *Against Settlement*, 93 YALE L.J. 1023 (1984) [hereinafter Fiss]. Professor Fiss argues that American willingness to utilize courts is a net positive, demonstrating both a social commitment to fairness and enforcement of individual rights as well as the courts' capacity to largely fulfill in a satisfactory way the demands placed upon them.

5. See, e.g., Bok, *supra* note 1; Burger, *supra* note 1. The sources cited in note 1 generally argue that court delay and backlog should be attacked aggressively through greater judicial efficiency and effort, improved lawyer competence, and use of effective settlement and case management techniques. To be sure, contrasting views can be found. See, e.g.,

proceeded, the perception of a litigation explosion has spurred adoption of alternative dispute resolution methods,⁶ tougher pleading standards,⁷ sterner and more readily available sanctions for discovery abuse,⁸ more comprehensive pretrial

Fiss, *supra* note 4; Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (arguing that judicial efforts to manage rather than decide cases and the attendant push for informal pretrial settlement has reduced power of certain litigants, reduced moral authority of courts, and shielded judicial error from meaningful review).

6. See, e.g., S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1986); J. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981). If necessary, these alternative dispute resolution methods may be annexed to the courts. See, e.g., Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64 (1983) (describing success of Eastern District of Pennsylvania court-annexed compulsory arbitration program for certain classes of cases as reducing demands on judicial resources); Negelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787 (1983). See also E. LIND & J. SHAPARD, *EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS* (1983).

7. See *Plausible Pleadings*, *supra* note 1; Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) [hereinafter Marcus]. Professor Marcus does not endorse a return to rigidly required fact or "code" pleading such as that which preceded the 1938 adoption of the Federal Rules of Civil Procedure but notes a trend toward returning to this stricter view of pleadings in the reported federal cases, a trend proceeding largely sub silentio, with courts dismissing claims by utilizing a fact/code pleading approach while simultaneously giving ostensible endorsement to the notice pleading approach established by the Federal Rules.

Notice pleading is the concept championed by the Reporter of the Federal Rules, Yale Law School Dean and Second Circuit Judge Charles Clark, (although he disliked the term, see Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976)), and established in Federal Rule of Civil Procedure 8, which deems a complaint sufficient when it contains a "short and plain statement" of the claim of injury and a request for relief. Rule 8(a) requires less specificity than did most jurisdictions prior to the adoption of the Federal Rules and is designed merely to place the defendant on fair "notice" of the dispute rather than to detail the facts claimant must prove to prevail at trial. In contrast, the prevailing school of legal pleading prior to the Federal Rules required a claimant to state in some detail all of the facts that it would prove at trial and outline how proof of those facts would set out the elements of or otherwise demonstrate that the claimant possessed a legal cause of action. See Marcus, *supra*, at 433-34.

After the adoption of the Federal Rules, key cases stressed the liberal attitude of notice pleading underlying the Rules, often in language that, if taken too literally, would prevent almost any complaint from being dismissed for failure to state a claim pursuant to rule 12(b)(6). See, e.g., *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"); *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). See also Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390 (1980) (arguing that courts frequently and improperly take a fact/code pleading approach to dismiss disfavored claims).

8. See, e.g., *Order Amending the Federal Rules of Civil Procedure*, 446 U.S. 997, 1000 (1980) (Justices Powell, Stewart, and Rehnquist dissent from the 1980 amendments, labeling them "tinkering" changes that do not forcefully address the problem of discovery abuse); Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. OF LITIGATION 1 (1982); Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579; Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1044-45 (1978). See also Cavanaugh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767 (1985) (arguing that while the 1983 amendments were a positive step toward correcting abusive discovery, standing alone they are not enough, and suggesting that the route toward more effective discovery could be found in the implementation of discovery reforms found in the local rules); Comment, *Sanctions Under Amended Rule 26—Scalpel or Meat-ax? The 1983 Amendments to the Federal Rules of Civil Procedure*, 46 OHIO ST. L.J. 183 (1985) (suggesting that amended rule 26 has not yet achieved its potential as a curb on discovery abuse, and urging stricter adherence by lawyers and judges to fulfill that potential).

The 1983 Amendments to the Federal Rules of Civil Procedure were in large part addressed to a perceived need to increase court authority and willingness to sanction pleading and discovery abuse. For example, rule 11 was amended substantially to convert the former subjective bad faith standard for determining whether a "pleading, motion, or other paper" was frivolous to an objective standard. Under the new standard, a paper is frivolous if in the eyes of a reasonable person it is not

well grounded in fact or not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and or is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Rule 26(g) was amended to state that an attorney's signing of discovery documents constituted a similar certification and that "[i]f a certification is made in violation of the rule, the court, upon motion or upon its own initiative shall impose . . . an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee." These revisions were made with the goal of increasing the use of such sanctions for both deterrent and cost-shifting effect. Courts have embraced the new powers provided by

management of cases,⁹ more prevalent fee shifting or adoption of the English Rule,¹⁰ and generally greater ease of pretrial disposition of cases. In 1986, the effect of this trend upon federal summary judgment practice became apparent.

Historically, the chief devices for disposing of matters without trial have been the demurrer,¹¹ the rule 12(b)(6) motion to dismiss for failure to state a claim,¹² and the summary judgment motion. With the adoption of the Federal Rules of Civil Procedure in 1938, demurrers were abolished.¹³ The liberal pleading standards of rules 8 and 9, as interpreted by leading cases¹⁴ made rule 12(b)(6) dismissals difficult to achieve,¹⁵ at least when courts adhered to the letter and spirit of the Supreme Court's pronouncements in the area.¹⁶ To summary judgment was left the formidable task of making the federal system "efficient,"¹⁷ by eliminating baseless claims before trial, a task many came to view as beyond its capabilities under the controlling

amended rule 11 more quickly than those of amended rule 26. See G. Vairo, Report to the Advisory Committee on Amended Rule 11 of the Federal Rules of Civil Procedure 5 (1987) (unpublished manuscript) (number of reported rule 11 cases has increased more than fifty-fold since 1983); SANCTIONS: RULE 11 AND OTHER POWERS (E. Epstein, G. Joseph & C. Shaffer, eds. 1985) (rule 11 has been the most popular sanctioning tool of judges; rule 26(g) seldom used in reported opinions).

9. See Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 MINN. L. REV. 1 (1984); Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

10. See Bishop, *Let's Adopt the English Fees Award System*, 4 CAL. LAW 10 (Feb. 1984); Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1982); Note, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALB. L. REV. 149 (1981).

11. A demurrer at common law or under most codes was a challenge to the legal sufficiency of the complaint. The demurrer takes as true the facts alleged in the complaint and "asserts that the action should be dismissed because, under the governing substantive law, no relief should be granted even if the facts were proven." F. JAMES & G. HAZARD, CIVIL PROCEDURE § 4.2 (3d ed. 1985) [hereinafter JAMES & HAZARD]. If the demurrer was granted by the court, the case was concluded on the merits and plaintiff could not amend or refile the complaint. However, the defendant faced some risk, too, in that its acceptance of the facts pleaded as true precluded the defendant from litigating these facts at trial if the demurrer was denied. See J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, CIVIL PROCEDURE 760-63 (4th ed. 1985) [hereinafter COUND]. By contrast, the modern federal defendant raising a motion to dismiss for failure to state a claim (see *infra* note 11) need only admit plaintiff's pleaded facts as true for purposes of deciding the motion to dismiss. See JAMES & HAZARD, *supra*, § 4.2.

12. The rule 12(b)(6) motion has replaced the demurrer, which was specifically abolished by the adoption of the Federal Rules of Civil Procedure in 1938. See FED. R. CIV. P. 7(c). The defendant makes the motion, admitting for purposes of the motion the truth of plaintiff's properly pleaded allegations, and the court determines whether plaintiff has stated facts that if proven true would entitle plaintiff to relief under the controlling law. See COUND, *supra* note 11, at 764-65; JAMES & HAZARD, *supra* note 11, at § 4.2.

13. See FED. R. CIV. P. 7(c).

14. See Conley v. Gibson, 355 U.S. 41 (1957); Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

15. See 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 598-605 (1979) [hereinafter WRIGHT & MILLER] (pointing out disfavored status of motion and relative ease by which many litigants can avoid dismissal for failure to state a claim through clever pleading even when case is unlikely to succeed at trial).

16. See Marcus, *supra* note 7, at 434.

17. See JAMES & HAZARD, *supra* note 11, at §§ 4.10, 5.19; C. WRIGHT, THE LAW OF FEDERAL COURTS 663-70 (4th ed. 1983) [hereinafter WRIGHT]; 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE §§ 2711, 2713 (1983) [hereinafter WRIGHT, MILLER & KANE]. Although these and other commentators have noted the limited utility of summary judgment for terminating cases, especially when courts take too restrictive a view of the procedure's availability, they also acknowledge, although sometimes more implicitly than explicitly, that the summary judgment procedure, since it permits court examination of the fact record after discovery, has more potential and actual ability to terminate cases as compared to the rule 12(b)(6) motion. The comparative advantages of summary judgment in this regard are especially strong in jurisdictions that take a liberal view of notice pleading such as that set forth in Conley v. Gibson, 355 U.S. 41 (1957), and Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944). See also Marcus, *supra* note 7, at 484-91 (arguing that courts seeking to curb unmeritorious litigation prior to trial should faithfully apply summary judgment procedure as a tool for effective pretrial termination of weak cases using rule 56(f) to permit nonmovant adequate discovery as a matter of fairness rather than rule 12(b)(6) motions premised on fact/code theory of pleading).

precedents. Some argued that language in certain precedents made summary judgment too difficult to obtain, allowing many obviously inadequate claims to proceed to trial and needlessly consuming judicial and litigant resources.¹⁸ Some proposed rewriting rule 56 itself.¹⁹ Others argued that the deficiency could be corrected by a substantially altered application of the rule²⁰ or by establishing as correct the more stringent approach to summary judgment found in some courts.²¹

In 1986, the United States Supreme Court issued three decisions that, taken together, effected major changes in summary judgment doctrine and practice. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,²² *Anderson v. Liberty Lobby, Inc.*,²³ and *Celotex v. Catrett*,²⁴ the Court specifically equated the standard for granting summary judgment under Federal Rule of Civil Procedure 56 with the directed verdict standard of Federal Rule of Civil Procedure 50(a). Implicitly, the Court also expanded a judge's power in the directed verdict context as well. In addition, the Court's rhetoric in these three cases changed the tone of judicial perspective on rule 56, creating a climate conducive to more frequent use and granting of the motion.²⁵

This Article views the Court's history and interpretation of precedent as faulty and ill-conceived in light of the purposes for which the civil litigation system exists. These cases, particularly *Liberty Lobby*, effectively rewrote rule 56 without benefit of the procedures for amending the Federal Rules required by the Rules Enabling Act of 1934.²⁶ These decisions have influenced lower courts to more readily grant summary judgment²⁷ and will likely have a ripple effect in those states with procedures modeled after the Federal Rules.

This Article argues that the Court's errors and its violation of prudent rulemaking departed from the generally accepted understanding of the proper role of both summary judgment and directed verdict. The Court took liberties with accepted judicial practice to rewrite the rules in a manner that will ultimately produce less accurate adjudication. Part I summarizes the Court's 1986 trio of summary judgment cases and their apparent impact.²⁸ Part II analyzes the shortcomings of *Liberty Lobby* and *Matsushita*.²⁹ Part

18. See D. HERR, R. HAYDOCK & J. STEMPEL, MOTION PRACTICE § 16.1.10 (1985) [hereinafter HERR] (contending that precedents and dicta suggesting summary judgment should be rarely granted and only in cases free of even the slightest doubt are in error and that rule 56 has greater utility, a fact recognized by a majority of federal courts); WRIGHT, MILLER & KANE, *supra* note 17, at § 2727; Accord Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 746 (1974) [hereinafter Louis]; Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U.L. REV. 774, 779 (1983) [hereinafter Sonenshein].

19. See, e.g., Schwarzer, *Summary Judgment: A Proposed Revision of Rule 56*, 110 F.R.D. 213 (1986).

20. See, e.g., Sonenshein, *supra* note 18, at 783-86; Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 77-79 (1977) [hereinafter Currie].

21. See, e.g., WRIGHT, MILLER & KANE, *supra* note 17, at § 2727; Louis, *supra* note 18, at 762-65.

22. 475 U.S. 574 (1986).

23. 477 U.S. 242 (1986).

24. 477 U.S. 317 (1986).

25. See Holzbreg, *High Court Encourages Summary Judgments*, LIT. NEWS, Winter 1988, at 1; Pierce, *Summary Judgment: A Favored Means of Summarily Resolving Disputes*, 53 BROOKLYN L. REV. 279, 286-87 (1987).

26. 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2072 (1982)).

27. See, e.g., Knight v. U.S. Fire Ins. Co., 804 F.2d 9 (2d Cir. 1986), *cert denied*, 107 S. Ct 1570 (1987); Certain British Underwriters at Lloyd's of London v. Jet Charter Serv., 789 F.2d 1534 (11th Cir. 1986); Raynor v. Richardson-Merrell, Inc., 643 F. Supp. 238 (D.D.C. 1986). See also Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491, 496-500 (1988) [hereinafter *Circumstantial Evidence*].

28. See *infra* text accompanying notes 32-79.

29. See *infra* text accompanying notes 80-328.

III examines the probable systemic effect of the Court's new summary judgment construct.³⁰ Part IV concludes with an analysis of proposed changes in pretrial adjudication pending before the Civil Rules Advisory Committee.³¹

I. THE TRIO OF CASES THAT CHANGED SOME OF THE LITIGATION WORLD

The Supreme Court seldom writes extensively about a federal rule of civil procedure.³² Ordinarily, civil procedure litigation is not viewed as raising questions of constitutional import. Circuit and district court cases that have interpreted the Federal Rules left comparatively little need for Supreme Court intervention during the past two decades. One therefore finds it surprising that the Court chose to hear and decide in one term three cases intimately involving a single federal rule and that the Court wrote extensively on the rule in all three cases. Knowing nothing more, the follower of Court advance sheets should immediately suspect something significant in progress. Such a suspicious, or even curious, reader would not have been disappointed during 1986.

A. *Matsushita v. Zenith*

The Court first decided a case that expressly said relatively little about summary judgment doctrine but presaged the Court's current fascination with disposing of cases, particularly large cases, without trial. In March 1986, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*³³ reversed the Third Circuit's finding that some of plaintiffs' claims of antitrust violations were not subject to summary judgment. Although the five-member Court majority technically did not enter summary judgment for defendants but remanded the matter to the circuit court with instructions to review the record for better evidence sufficient to overcome defendants' showing of entitlement to judgment, the functional result of *Matsushita* was to end the case.³⁴

30. See *infra* text accompanying notes 329-408.

31. See *infra* text accompanying notes 409-450.

32. Ordinarily the Court's docket is consumed by constitutional questions such as first amendment rights of access, fourth amendment protections against illegal search and seizure, fifth and fourteenth amendment due process rights, fourteenth amendment rights to equal protection, and the delicate balance of state and federal authority along with the separation of powers of the national government.

Frequently, the Court must also interpret recent or previously unexamined congressional legislation even when no constitutional right is at issue. Indeed, one of the purposes suggested by those favoring a national court of appeals would be that proposed court's focus on questions of federal statutory interpretation, freeing the Supreme Court to concentrate more completely on constitutional adjudication. See Baker & McFarland, *Commentary: The Need for a New National Court*, 100 HARV. L. REV. 1400 (1987). The Court also seeks to eliminate unacceptable conflicts of interpretation among the circuit courts of appeals or between state and federal courts. See S. Ct. Rule 17.1. Most proposals for a national court of appeals are advanced on the grounds that such court would reduce the Supreme Court's caseload in this area as well. See Baker & McFarland, *supra*, at 1404-09. See also 28 U.S.C. §§ 1252, 1257 (1982) (providing for appellate jurisdiction of Supreme Court when the constitutionality of a federal law is called into question).

33. 475 U.S. 574 (1986).

34. On remand, the Third Circuit, as one might expect, took the hint from the Supreme Court and affirmed the entry of summary judgment in favor of all *Matsushita* defendants. 807 F.2d 44 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1955 (1987), but not without questioning the logic and candor of the Court's remand opinion. Said the Third Circuit: We find [the Supreme Court's] suggestion [that the Circuit Court examine the record for direct evidence of a conspiracy] somewhat confusing since the Supreme Court had the very same summary judgment record before it that this court had considered, and does exercise the same plenary review of the propriety of the district court summary judgment.

Plaintiffs, a group of American consumer electronics manufacturers, brought suit against a number of Japanese manufacturers of televisions, stereos, and other electronic goods alleging that the Japanese companies had sold their products below marginal cost in the United States consumer market in order to gain a dominant position in the market and with the intent of driving the American manufacturers from the consumer electronics business. Plaintiffs and their expert witnesses suggested that the defendants were able to accomplish the alleged prolonged predatory pricing because of profits they obtained in Japan through concerted action, backed by government support, maintaining high prices in the Japanese market.³⁵

The case, popularly known as *Japanese Electronics*, began in 1974³⁶ and itself could support a seminar in complex litigation practice. The case has occupied three federal district judges, resulting in a myriad of reported district court opinions and court orders.³⁷ Following substantial discovery and pretrial practice, the trial court, after finding inadmissible much of plaintiffs' proffered expert testimony in opposition to defendants' motion for summary judgment,³⁸ granted summary judgment on the merits of plaintiffs' antitrust claims.³⁹ The trial court's exclusion of expert evidence that permitted entry of summary judgment was heavily criticized by some commentators.⁴⁰ The appeals court reversed the trial court, holding that the district judge had erroneously excluded much of plaintiffs' expert testimony in opposition to the summary judgment motion by ruling that material relied upon by the expert was inadmissible hearsay. Once the expert affidavits were of record, the Third Circuit found a genuine dispute existed as to material facts at issue in the litigation, thereby

Id. at 46. The circuit court also implied that the Supreme Court had in effect overruled earlier evidentiary rulings or had announced a new rule of law in conclusively holding that the *Matsushita* defendants had no motive to enter into the alleged conspiracy. *Id.* at 47.

35. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

36. *Id.* at _____ n.1, 106 S. Ct. 1348, 1351 n.1 (1986).

37. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 244 (E.D. Pa. 1975). *In re Japanese Elec. Prods. Antitrust Litig.*, 388 F. Supp. 565 (Jud. Pan. Mult. Lit. 1975). In one widely noted opinion, the Third Circuit reversed a district court ruling that plaintiffs were entitled to a jury trial in the matter despite the complexity of the case. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980). Cf. *In re United States Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980), overruling *In re United States Fin. Sec. Litig.*, 75 F.R.D. 702 (S.D. Cal. 1977) (holding that complexity and length of case otherwise subject to seventh amendment right of jury trial for actions at law do not give rise to due process concerns exempting case from scope of seventh amendment). Other district court opinions of note examined the occasionally vexing evidentiary questions presented in the case. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1313 (E.D. Pa. 1981) (excluding as inadmissible large portions of expert testimony offered by plaintiffs); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125 (E.D. Pa. 1980) (excluding as inadmissible hearsay various government records and reports); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190 (E.D. Pa. 1980) (excluding as inadmissible various business documents offered pursuant to exceptions in hearsay rule). Many of these district court evidentiary rulings were overturned by the Third Circuit during the course of its review of the summary judgment question, allowing these items to be admitted into the record in opposition to the motion. See *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983).

38. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190 (E.D. Pa. 1980) (holding much of the material used in affidavits in opposition to summary judgment and deposition testimony by plaintiff's expert witnesses to be inadmissible hearsay and not subject to Federal Rule of Evidence 703, permitting expert use of and presentation at trial of data "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject" even where it would not, standing alone, be admissible in evidence). The district court's evidentiary analysis and rulings were strongly criticized in J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶702[02] (1983) [hereinafter *WEINSTEIN & BERGER*].

39. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981).

40. See, e.g., *WEINSTEIN & BERGER, supra* note 38.

precluding summary judgment.⁴¹ The Supreme Court granted certiorari and reversed the appeals court, remanding the case with a *de facto* death knell.⁴² If nothing else, even a brief review of the history of *Japanese Electronics* illustrates the maxim that "the opera ain't over until the fat lady sings."⁴³

As Justice Robert Jackson once said in describing the Supreme Court's work, "we are not final because we are infallible but we are infallible only because we are final."⁴⁴ Having the last word on *Matsushita*, the Supreme Court delivered a sharply divided five-four decision in which the majority ostensibly agreed with the Third Circuit's evidentiary holdings but found summary judgment appropriate on the evidentiary record before the Court because plaintiffs' theory of the case was "implausible."⁴⁵ Specifically, Justice Powell, writing for the majority, found it highly implausible as a matter of economic theory and business psychology that the defendants would sell consumer electronics products below their marginal cost of production for up to thirty years when these alleged practices had failed to drive American competitors out of the market. To the majority, these were not the practices of prudent businesspeople and therefore almost certainly could not have occurred.⁴⁶ The Court then found the plaintiffs' proffered circumstantial evidence of predatory pricing, including five expert reports, although admissible, to be insufficient to rebut the majority's view of rational economic behavior. The Court therefore remanded the case for further Third Circuit scrutiny in search of any such direct evidence to overcome the Court's antitrust economic presumptions.⁴⁷

Justice White, writing for four dissenters, noted that the expert affidavits and reports proffered by plaintiffs offered a seemingly plausible rationale for the alleged extensive dumping by the defendants.⁴⁸ Plaintiffs' experts had stated that defendants were capable of an extended effort to sell products below marginal cost in the United

41. *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983).

42. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Third Circuit affirmed the trial court's judgment as to all defendants. *See In re Japanese Elec. Prods. Antitrust Litig.*, 807 F.2d 44 (1986), *cert. denied*, 107 S. Ct. 1955 (1987).

43. The "fat lady" saying, popularly seen as originating with former Washington Bullets coach Dick Motta's description of his team's come from behind heroics in winning the 1979 National Basketball Association championship, seems to have also found a parallel home as illustrating the possibility of eleventh hour litigation victory. *See, e.g.,* HERR, *supra* note 18, at § 22.1; D. LYNN, *THE APPELLATE LITIGATION PROCESS* vii (1985).

44. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

45. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, _____, 106 S. Ct. 1348, 1358-59, 1361 (1986) (finding "absence of any plausible motive to engage in" alleged antitrust violation).

46. *Id.* at _____, 106 S. Ct. at 1358-61, 1359 ("[t]he alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist").

47. *Id.* at _____, 106 S. Ct. at 1355 ("issue in this case [is] whether respondents adduced *sufficient* evidence in support of their theory to survive summary judgment") (emphasis added); *id.* at 1356 (if plaintiffs' claim is "implausible" or "makes no economic sense" summary judgment appropriate); *id.* at 1359 ("alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist").

48. *Id.* at _____, 106 S.Ct. at 1362, 1364-66 (White, J., dissenting). The plaintiffs' expert affidavits were still technically of record because the Third Circuit had ruled them admissible and the Court majority had not granted certiorari as to this holding. The dissent found these affidavits, if credited, to pose a triable issue. For example, the report made by plaintiffs' expert Dr. Horace J. DePodwin concluded that the defendants' collusive behavior in Japan eliminated competition in that market and enabled them to expand exports into the United States, that "the American manufacturers of television receivers would have made larger sales at higher prices in the absence of the Japanese cartel agreements," and that the expanded exports brought increased investment to the defendants, resulting in manufacturing plant modernization and expansion.

States because it was important to them to maintain and increase market share in America and elsewhere in order to maintain plant capacity, overall economies of scale, and the essentially guaranteed employment of its labor force.⁴⁹ Plaintiffs' experts had stated that the defendants' sizable profits in Japan were obtained by concerted action and were in effect used to subsidize extended predatory pricing in the American market.⁵⁰ With this evidence in the record, the dissenters argued, it was logically impossible to declare plaintiffs' theory of the case too implausible to merit at least a trial on the matter.⁵¹

B. Anderson v. Liberty Lobby

In *Anderson v. Liberty Lobby, Inc.*,⁵² the Court granted certiorari to review a District of Columbia Circuit case granting partial, but denying complete, summary judgment to media defendants sued for libel by the subjects of two articles. Plaintiffs Willis Carto, a right-wing publisher, and Liberty Lobby, the organization he headed that espoused similar right-wing views, were profiled in two articles by *The Investigator*, a magazine published by well-known columnist Jack Anderson. The two main articles were titled: "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." They were introduced by a third, shorter piece, "America's Neo-Nazi Underground: Did *Mein Kampf* Spawn Yockey's *Imperium*, a Book Revived by Carto's Liberty Lobby?" In the words of the Supreme Court, "[t]hese articles portrayed the respondents as neo-Nazi, anti-Semitic, racist, and fascist."⁵³

Predictably, Carto and Liberty Lobby were somewhat upset when these articles appeared. They filed a libel suit against Anderson, *The Investigator's* parent company, and its chief executive officer. Defendants moved for summary judgment, which was granted by the district court, successfully persuading the court that the undisputed factual record left no question that the defendants had acted with requisite care in researching, developing, and writing the stories.⁵⁴

The circuit court reversed in part on appeal,⁵⁵ finding a genuine dispute between the parties as to whether *The Investigator* and its reporters had gathered information in such a way as to preclude a jury determination that they had published some statements about Carto and Liberty Lobby with "reckless disregard as to their truth or falsity."⁵⁶ The opinion by Judge, now Justice, Antonin Scalia implied that some

49. *Id.* at _____, 106 S.Ct. at 1364-66 (White, J., dissenting).

50. *Id.*

51. *Id.* at _____, 106 S. Ct. at 1366-67 (White J., dissenting).

52. 477 U.S. 242 (1986).

53. *Id.* at _____, 106 S. Ct. 2505, 2508 (1986).

54. See *Liberty Lobby, Inc. v. Anderson*, 562 F. Supp. 201 (D.D.C. 1983).

55. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984).

56. Because of the chilling first amendment implications of permitting libel plaintiffs to prevail merely because of errors by the speaker, the Supreme Court has required for the past quarter-century that a defamation claimant who is a public figure, to succeed, prove by clear and convincing evidence that the defamatory statements at issue were published with defendant knowledge that they were false or with reckless disregard as to their truth or falsity. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Few journalists would print or broadcast a statement they knew to be incorrect. Consequently, in defamation claims against the media, the crucial issue usually devolves to whether defendant conduct resulting in publication of an incorrect

aspects of the defendants' methodology bordered on shoddy journalism. In particular, the circuit court criticized one article's reliance on the work in progress of an essentially unknown freelance reporter⁵⁷ and the defendants' reliance on a previously published article that had been the subject of a libel action.⁵⁸

In the Supreme Court, the journalistic craftwork of *The Investigator* was viewed more favorably. Viewing the same record upon which the circuit court found room for reasonable dispute as to the care with which defendants acted, the Court's six-member majority found nothing actionable. The Court, however, did not rest its reinstatement of the defendant's summary judgment on an asserted complete absence of any fact dispute. Rather, the Court's approach and decision established two significant changes in federal civil procedure. The first was the Court's pronouncement on the question for which certiorari was granted—whether the standard of proof required at trial must be considered by the court ruling on a summary judgment motion.⁵⁹ The Court held that the party opposing summary judgment must demonstrate to the court the existence of a fact dispute that would support a verdict in its favor applying the substantive standard of proof to be used at trial.⁶⁰ In *Liberty Lobby*, this meant that facts at issue must be such as to support a finding by "clear and convincing evidence" that defendants had acted with malice since the clear and convincing evidence standard, rather than the ordinary preponderance of the evidence standard, was applicable to libel claimants.

The Court's second pronouncement addressed the factual showing required by a nonmovant to avoid summary judgment. Prior to *Liberty Lobby*, the general rule and practice of federal courts had been to deny summary judgment whenever the respondent demonstrated, through matter that would be admissible at trial, the existence of a genuine dispute of material fact.⁶¹ Ordinarily, this could mean either that there was a nonfrivolous disagreement between the parties as to the fact (for example, whether the traffic light was red or green) or that there was an important

defamatory statement was more than mere negligence or unavoidable accident but rose to the level of what the factfinder deems clear reckless conduct. See e.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (libel judgment upheld where reporter's construction of pleadings and court decision as to grounds for divorce found inaccurate but not intentionally so); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (use of simple negligence standard in public figure libel claims would chill first amendment by placing intolerable burden on press to guess as to what jury would construe as reasonable care); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (newspaper sued for publishing paid advertisement, not product of news or editorial staff, that contained some inaccuracies).

57. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1578 (D.C. Cir. 1984).

58. *Id.*

59. A discussion of the wisdom of incorporating the substantive burden of proof at trial to summary judgment proceedings is beyond the scope of this article; that portion of the *Liberty Lobby* opinion will not be criticized except as it exacerbates the problems created elsewhere in the opinion. However, this part of the *Liberty Lobby* holding is not without controversy. Compare *id.* at 1570 ("Imposing the increased proof requirement [of proof by clear and convincing evidence] at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well.") with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2512 (1986) ("where the First Amendment mandates a 'clear and convincing' standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity.").

60. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, _____, 106 S. Ct. 2505, 2512 (1986).

61. See *COUNG*, *supra* note 11, at 772-87; *WRIGHT*, *supra* note 17, at 663; *WRIGHT, MILLER & KANE*, *supra* note 17, at § 2712.

uncontested fact or facts that could be interpreted by judge or jury in different ways affecting the liability determination.⁶²

The *Liberty Lobby* Court held that a movant's evidence opposing a properly made summary judgment motion must be more than merely possible or colorable. Instead, the Court held that a movant's evidence must be of sufficient probative value to withstand a directed verdict motion and support the verdict of a reasonable jury.

In dissent, Justice Brennan accused the majority of misreading earlier precedents and changing the rule 56 standard and approach previously endorsed by the Court.⁶³ Like Justice Brennan's dissent, part II(A) of this Article⁶⁴ argues that the majority opinion changed summary judgment in all cases, not only libel actions. Justice Rehnquist and former Chief Justice Burger in a separate dissent criticized the majority for granting preferential treatment to the press through a change in summary judgment procedure applicable to libel suits.⁶⁵

C. Celotex v. Catrett

In *Celotex Corp. v. Catrett*,⁶⁶ a decision handed down on the same day as *Liberty Lobby*, the Court approved a grant of summary judgment for an asbestos manufacturer whose motion contended that plaintiff, despite discovery, had entered into the record no evidence that the decedent was exposed to defendant's asbestos products. The district court in an unreported opinion had granted the summary judgment motion. The District of Columbia Circuit reversed,⁶⁷ holding that it was incumbent on a summary judgment movant such as Celotex to demonstrate affirmatively that plaintiff's decedent was not exposed to Celotex asbestos. Taking certiorari, the Supreme Court was virtually uniform in rejecting the circuit court's legal analysis. The Supreme Court found no such requirement in rule 56 jurisprudence but divided rather sharply over the proper disposition of the case on its facts.

62. Federal Rule 56 speaks of a "genuine issue as to any material fact," a phrase that is often described in shorthand as a genuine "dispute" of fact, implying that the movant must have one set of alleged facts and the nonmovant at least one important but different alleged fact. However, a "genuine issue" also exists where the parties agree to the facts but place a different interpretation upon them. For example, was the driver leaving the scene of an accident running away, as the plaintiff suggests, or trying to get medical help, as he claims? Both sides agree to the "fact" that he was driving down Main Street away from the accident but they disagree as to the proper interpretation and attendant legal consequence of that conduct. The parties' disagreement is one as to what this article terms "fact interpretation" rather than "fact existence." If, for example, the plaintiff claimed that defendant began to leave the scene and defendant produced an affidavit from himself or a witness averring that he had never left the accident, this summary judgment issue would focus on fact existence.

Although the major commentators and articles surveyed for this Article do not appear to use the fact interpretation/fact existence nomenclature, it is a useful clarifying and organizing device not inconsistent with summary judgment jurisprudence. See JAMES & HAZARD, *supra* note 11, at § 7.10 ("the jury's function may extend to two kinds of questions: (1) what were the happenings, occurrences, conduct of the parties—i.e., what the parties did and what the circumstances were—and (2) the evaluation of these "facts" in terms of their legal consequences") (citation omitted). This Article terms the former category questions of "fact existence" and refers to the latter category as questions of "fact interpretation."

63. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2515 (1986) (Brennan, J., dissenting).

64. See *infra* text accompanying notes 99–121.

65. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2520 (1986) (Burger, C.J., dissenting).

66. 477 U.S. 317 (1986).

67. *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181 (D.C. Cir. 1985).

Justice Rehnquist, writing for the majority, observed that Celotex's summary judgment burden required only that it point out in the record the lack of any evidence to support plaintiff's contention of decedent's exposure to Celotex asbestos. At that juncture, plaintiff was required to highlight in the record or present by affidavit some evidence of exposure.⁶⁸ Justice White, who provided the fifth vote for the majority, concurred separately, taking pains to state that the Court's holding in *Catrett* did not permit a summary judgment movant to shift the burden of production to the respondent merely "with a conclusory assertion that the plaintiff has no evidence to prove his case."⁶⁹

Justice Brennan, joined by former Chief Justice Burger and Justice Blackmun, dissented,⁷⁰ not so much disputing the majority's restatement of the law of summary judgment as criticizing its application to the facts of the case. Specifically, these dissenters found sufficient evidence in the record to create a genuine issue of material fact that required a jury determination on the question of whether plaintiff's decedent was exposed to Celotex asbestos.⁷¹ Justice Stevens dissented separately, finding a district court venue error in reading the record and concluding that the Court should "affirm the [circuit court's] reversal of summary judgment on that narrow ground."⁷² On remand, the Circuit Court, applying the Supreme Court methodology, again reversed, finding plaintiff's submissions to have created a genuine issue of material fact.⁷³

That the *Catrett* case engendered a close and contested vote of the Court seems surprising in light of the more far reaching but less divided *Liberty Lobby* decision. All nine justices appeared to agree on the technical legal issue in *Catrett*—the showings movant and nonmovant must make to satisfy the summary judgment burdens of production. The Court's collective conclusion on this point seems not to declare any substantial change in the law of summary judgment but rather clarifies any ambiguity that might have existed in lower court cases.

D. The Trio as Trend

Amid the shifting votes and rationales of *Matsushita*, *Liberty Lobby*, and *Catrett*, perhaps the major common thread is that the majority opinions read like an ode to the wonders of summary judgment.⁷⁴ In *Catrett*, for example, Justice Rehnquist wrote:

68. *Celotex v. Catrett*, 477 U.S. 317, _____, 106 S. Ct. 2548, 2553 (1986).

69. *Id.* at _____, 106 S. Ct. at 2555 (White, J., concurring).

70. *Id.* at _____, 106 S. Ct. at 2556.

71. *Id.* at _____, 106 S. Ct. at 2559–60.

72. *Id.* at _____, 106 S. Ct. at 2560 (Stevens, J., dissenting).

73. See *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33 (D.C. Cir. 1987); Note, *Civil Procedure—Celotex Corp. v. Catrett: Lessening the Moving Party's Burden for Summary Judgment*, 17 MEM. ST. U.L. REV. 293, 316 (1987).

74. I borrow this apt characterization from Professor Vairo's discussion of the *Catrett* majority opinion in G. Vairo, *New Trends in Summary Judgment Practice* [hereinafter Vairo] (paper in progress; copy on file with the Ohio State Law Journal). I view this description as rightly applied to a collective reading of *Matsushita*, *Liberty Lobby*, and *Catrett* as well. Accord *Pierce*, *supra* note 25, at 286–87.

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.⁷⁵

Courts viewing summary judgment motions in the aftermath of this trio of cases have listened to their music, even if not pausing long enough to hear the words. The essential message of the Supreme Court has been: "Loosen up. Forget old dictum too solicitous of nonmovants. Court congestion is a problem. If trial courts start aggressively granting summary judgment, we are reluctant to second-guess them as might less-enlightened circuit panels." Taking the cue, district and circuit courts have entered summary judgment in tough cases,⁷⁶ have declared their allegiance to the *Liberty Lobby* dicta,⁷⁷ and have invited litigants to make summary judgment motions, suggesting that courts will usually grant them.⁷⁸ Although system-wide empirical data is not readily available, it seems likely that the momentum of these cases, particularly *Liberty Lobby*, is having an effect on federal court practice,

75. *Celotex v. Catrett*, 477 U.S. 317, _____, 106 S. Ct. 2548, 2555 (1986).

76. See, e.g., *LANINGHAM v. UNITED STATES NAVY*, 813 F.2d 1236, 1241-43 (D.C. Cir. 1987) (citing *Liberty Lobby* for the proposition that summary judgment "mirrors" directed verdict and that a court must assess nonmovant's evidence and inferences to determine whether they could persuade a reasonable jury); *Lichtie v. U. S. Home Corp.*, 655 F. Supp. 1026, 1028 n.1 (D. Utah 1987) (*Liberty Lobby* cited as court grants summary judgment in case hinging on motivation and state of mind of defendant who discharged plaintiff; court finds insufficient evidence of self-interest to permit jury consideration or support reasonable jury's verdict); *New York v. Bowen*, 655 F. Supp. 136 (S.D.N.Y. 1987) (partial summary judgment granted for plaintiff challenging validity of state disability per se rules; court, citing *Liberty Lobby*, evaluates state's expert medical testimony and documentation as insufficiently probative to support a reasonable jury's verdict).

But see *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208, 1212-13 (D.C. Cir. 1986) (taking narrow reading of *Liberty Lobby*, court reverses summary judgment granted *Science* magazine for allegedly defamatory statements about expert witness in Bendectin drug cases; "court simply has no warrant to dismiss a libel suit because it doubts that a jury will ultimately return a verdict for the plaintiff"). The *McBride* court's holding seems impossible to square with *Liberty Lobby* but for the possibly inadequate discovery opportunity afforded plaintiff, whose counsel additionally appears not to have performed well. See *id.* at 1210-11. The article attacked by Dr. McBride had stated the rate of his expert witnesses fees for Bendectin trials and those of other expert witnesses. McBride's claim was that these juxtaposed figures made him appear a "hired gun" since his fees were substantially higher than the others set forth in the article. Without belittling McBride's claim, one can safely say that these statements pale in comparison to the negative impact of those at issue in *Liberty Lobby*. However, the latter were found conclusively not to have been made with reckless disregard despite evidence of record of questionable editorial practices. The former were allowed to continue toward trial despite apparent absence of any actions by the defendant that might give rise to an inference of reckless disregard or knowing falsity.

77. See Childress, *A New Era For Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 193-94 (1987) [hereinafter Childress]. See also *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 861 (5th Cir. 1986); *Gramenos v. Jewel Cos.*, 797 F.2d 432, 438 (7th Cir. 1986); *Berg v. First Am. Bank Shares, Inc.*, 796 F.2d 489, 497 (D.C. Cir. 1986); *Richardson v. U.S. News & World Report, Inc.*, 639 F. Supp. 595, 607 (D.D.C. 1986).

78. See *Knight v. U. S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), cert. denied, 107 S. Ct. 1570 (1987); *Pierce*, *supra* note 25.

making summary judgment easier to obtain⁷⁹ and involving trial judges in more activities that look suspiciously like pretrial factfinding.

II. CRACKS IN THE MIRROR: THE COURT'S ERRORS OF HISTORY, PRECEDENT, AND ANALYSIS

The Court's holdings and pro-summary judgment rhetoric were more than information communicated to lower courts about the fine points of an existing rule. Rather, the trio of cases convey a banner message from the Court to judges and attorneys in the federal courts that a tougher summary judgment rule holds the key to easing needlessly mounting pressure on federal court dockets.

Matsushita unwarrantedly strengthened summary judgment by expanding the courts' authority to foreclose from the factfinder certain interpretations of facts and to declare a plaintiff's theory of the case impossible as a matter of law. *Liberty Lobby* equated summary judgment with directed verdict and suggested that judges may assess the probative worth of competing evidence at either the summary judgment or directed verdict stage of proceedings. The *Catrett* decision may have overlooked important aspects of the case record in its zeal to see summary judgment entered as well as extolled.

Matsushita and *Liberty Lobby* run counter to the intent and the language of rule 56, cut against prevailing federal court summary judgment practice from 1938 to 1986, change rule 56 practice sufficiently to amount to a rewriting of the rule without following the amendment procedures set forth in the Rules Enabling Act, expand too greatly the power of the bench at the expense of the jury, and will result in less accurate adjudication by removing too many disputes from the probative crucible of trial.

A. *Re-Examining Matsushita and Liberty Lobby*

1. *An Analysis of Matsushita on Its Facts and Law*

The different philosophies and practices of Japanese and American business have received such widespread attention during the past fifteen years that many of the facts supporting plaintiffs' contentions and those of the dissent seem at least as plausible as the economic theory of the majority.⁸⁰ Much has been made of the

79. See Childress, *supra* note 77, at 193; Pierce, *supra* note 25; Vairo, *supra* note 74; Project, *Leading Cases*, 100 HARV. L. REV. 100, 250-58 (1986) (*Liberty Lobby* "likely to increase the frequency with which courts grant summary judgment"; *Catrett* and *Liberty Lobby* "should encourage courts to grant summary judgment more freely"). The case report also analyzed *Liberty Lobby* as not restricted to defamation cases and viewed *Liberty Lobby* as moving the summary judgment inquiry away from the need to characterize issues as "factual" or "legal" and toward a direct court analysis of the worth of nonmovant's evidence. *Id.* at 256.

80. The rules of evidence provide that a federal court may take judicial notice of a fact if it is "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). While the many articles, studies, and anecdotes available concerning the different approaches of American and Japanese business, see *infra* note 81, may not quite rise to the level of uncontested fact fit for judicial notice, these widely perceived facts at least suggest that the *Matsushita* plaintiffs' theory of the case and supporting expert opinion should not be easily dismissed as implausible.

longer term, multiple market view of Japanese business as contrasted to American business practice. Equally noted in popular trade culture is the Japanese policy in favor of lifetime employment and against layoffs as well as Japanese concern for maintaining efficient, modern plant production, for achieving economies of scale, and for focusing on expansion into new markets.⁸¹

In spite of these differences, the Court rushed to apply an assumed American motivational construct to the Japanese. The Court presumed that because American businesses usually lack the patience and cooperation to engage in successful predatory pricing, Japanese businesses must lack it too. The Court also freely assumed that any general business community aversion to delayed profits was also shared by the defendants. As to the question of whether the alleged dumping strategy had achieved results, the majority opinion itself provides some plausibility for plaintiffs' theory of the case. Plaintiff National Union Electric Corp. was a corporate successor to Emerson Radio Co., which sold television sets until 1970, "when it withdrew from the market after sustaining substantial losses."⁸² On the record before the Court, at least some diminution of the American manufacturing presence in the small home electronics market had occurred. Although the majority opinion stressed that plaintiffs Zenith and RCA were still the largest sellers of television sets in the American market, it seemed unimpressed that the defendants' collective share of this market rose from less than twenty percent to nearly fifty percent during the 1970s.⁸³ In addition, the number of American firms manufacturing television sets declined from nineteen to thirteen, a fact the majority dismissed as merely continuing "a trend that began at least by 1960, when petitioners' sales in the United States market were negligible."⁸⁴ Perhaps these changes were not the result of any illegal pricing activity by the Japanese manufacturers. Perhaps no antitrust activity occurred. Nonetheless the record of circumstantial and expert evidence before the Court seemingly required a factfinder to decide the issue.

81. See, e.g., T. OZAWA, *JAPAN'S TECHNOLOGICAL CHALLENGE TO THE WEST 1950-74: MOTIVATION AND ACCOMPLISHMENT* 100-20 (1974) (Japanese merchants have inferiority complex toward West regarding industrialization, modernization, business success and seek to overcome this by surpassing Western nations in industrial performance and marketing); Y. TSUMURUMI, *THE JAPANESE ARE COMING* 217-42 (1976) (Japanese businesses and workers have different relationships, bonds of loyalty than American counterparts; Japanese merchant class has utilized variant of Samurai ideology of Japanese feudalism to spur worker productivity, willingness to accept lower pay to achieve expanded business success to honor Japan; business success equated with patriotism). A glimpse of the differing psychology at work in Japan is demonstrated in the company anthem of Matsushita:

For the building of a new Japan
Let us put our strength and mind together
Doing our best to promote production
Sending out goods to the people of the world,
Endlessly and continuously
Like water gushing from a mountain.

Id. at 230. In addition to providing an almost humorous contrast to the American manufacturing plant (one cannot imagine even gung-ho workforces like those of Texas Instruments lining up each day to sing a similar anthem), the Matsushita theme song stresses production and export rather than profitability, an emphasis that seems intuitively distinct from the American mindset. See also Marx, Book Review, 86 *YALE L.J.* 1509 (1977) (highlighting differences in American and Japanese society regarding criminal law, entertainment, and social behavior).

82. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, _____, 106 S. Ct. 1348, 1351 (1986).

83. *Id.* at _____, 106 S. Ct. at 1358.

84. *Id.* at _____ n.14, 106 S. Ct. at 1358 n.14.

Instead of permitting a factfinder to determine the reasons for the decline in American consumer electronics sales, the majority dismissed as unconvincing the admitted evidence supporting plaintiffs. The Court said that only additional direct evidence of a conspiracy would suffice to overcome the presumption in favor of defendants created by the Court's economic and psychological theories. This view runs counter to the general rule in litigation, both civil and criminal, that an element necessary to a claim may be proven by either direct or circumstantial evidence.⁸⁵ In civil litigation, in which the claimant must make its showings by a preponderance of the evidence rather than beyond a reasonable doubt, circumstantial evidence alone frequently suffices to achieve a claimant's victory.⁸⁶

The majority's assertion that plaintiffs' economic argument is highly implausible also seems too much in light of the expert sources offered by plaintiffs to support their contention of defendants' concerted activity and long-term commitment to market acquisition through below cost pricing. For example, plaintiffs proffered the economic expert reports of Dr. Horace J. DePodwin, Dean of the Graduate School of Business Administration at Rutgers University,⁸⁷ Kozo Yamamura, Professor of Economics and Asian Studies at the University of Washington,⁸⁸ Gary R. Saxonhouse, Professor of Economics at the University of Michigan,⁸⁹ and John O. Haley, Associate Professor of Law at the University of Washington.⁹⁰ All of these experts expressed the view that plaintiffs' theory of the case was plausible in terms of economic theory and Japanese business practices as reflected in documents proffered by the plaintiffs. Professor Yamamura's report suggested that plaintiffs' theory of the case could well describe the export marketing practices of many Japanese industries.⁹¹

The district court excluded most of this material as based on inadmissible hearsay, irrelevant, or more prejudicial than probative. The circuit court reversed these most crucial trial court evidentiary rulings. The Supreme Court majority simply treated these experts' views as insufficient to disturb its preferred economic theories. Of the approaches of the three courts, the Supreme Court's approach to the expert submissions seems the least intellectually honest. Moreover, the Court's approach is inconsistent with the Federal Rules of Evidence and Civil Procedure in that when faced with conflicting testimony and interpretation, the Court chose the interpretation it preferred, often drawing that interpretation from scholarly writings not in the record of the case. The Court thereby assessed the probative value of each side's evidence in a manner not customarily viewed as appropriate in deciding a summary judgment motion. If, for example, Justice Powell had sat on the tenure and promotion

85. A point may be proven at trial by either direct or circumstantial evidence. See J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN & J. MANSFIELD, *CASES AND MATERIALS ON EVIDENCE* 867, 875, 882-84 (6th ed. 1973).

86. The use of circumstantial evidence to prove a claim is especially common in civil litigation where to obtain relief, the claimant need ordinarily prove its case by a "preponderance of the evidence" rather than a more stringent standard such as "clear and convincing evidence" or "beyond a reasonable doubt." See *id.* at 882-84.

87. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1334, 1362 (E.D. Pa. 1981).

88. *Id.* at 1364.

89. *Id.* at 1376.

90. *Id.* at 1378.

91. *Id.* at 1364-65.

committees of Rutgers, Washington, or Michigan, he may well have been entitled to conclude that the thoughts of DePodwin, Yamamura, Haley, and Saxonhouse were unimpressive. As an appellate judge, he should not have been so quick to discredit their views as "implausible."

In the main, *Matsushita* seems more an opinion restricting the use of antitrust claims than an opinion on summary judgment. Summary judgment was merely the vehicle by which the Court rid the judicial system of an antitrust claim disfavored by five of the Court's members. As to summary judgment doctrine itself, the Court did not make vast doctrinal pronouncements. The majority did, however, through its application of rule 56, signal a changed perspective on the degree to which rule 56 permits a court to eliminate a claim because of the judge's view of human motivation. The Supreme Court majority in *Matsushita*, in effect, stated that without direct evidence a plaintiff alleging predatory pricing in violation of the antitrust law could not possibly be entitled to relief in situations in which a majority of the reviewing judges believed that the alleged predatory pricing could not have occurred without achieving more tangible success.⁹²

92. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, _____, 106 S. Ct. 1348, 1359-60, (1986) (Justice Powell delivers his view of economic reality: "The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist," and outlines a likely chain of business behavior and list of things that must occur for predatory pricing to deliver economic reward to the predators). Somewhat surprisingly, Justice Powell makes these assertions, so important to terminating the case, without a single citation of authority or empirical evidence to support his view of economic reality.

To be sure, earlier in the opinion, Justice Powell cited extensively the writings of noted academics. *Id.* at _____, 106 S. Ct. at 1357-59. In overwhelming degree, however, these authorities are all leading disciples of the "Chicago School" (see Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979)) of economics, a group that largely proceeds from the premise that the very existence of most of American antitrust law is unwise. For example, the *Matsushita* opinion cites as incontestable economic authority R. BORK, *THE ANTITRUST PARADOX* 145 (1978); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 699 (1975); Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 26-27 (1984); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981); Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & ECON. 137 (1958); and McGee, *Predatory Pricing Revisited*, 23 J. L. & ECON. 289, 295-97 (1980).

Although these authors and studies are all notable, they may not represent the mainstream of American economic thought, and certainly do not represent the only stream of American economic thought. Some of these sources have been persuasively criticized as simply being "wrong" in some of their major premises. See, e.g., Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust As a Window*, 61 N.Y.U. L. REV. 554, 564-65, 578 (1986) (arguing that Judge Bork erred in characterizing the congressional intent behind Sherman and Clayton Acts as only encouraging the most efficient production of goods and lowest prices to consumers in the aggregate); Orland, *The Paradox in Bork's Antitrust Paradox*, 9 CARDOZO L. REV. 115 (1987) (concluding that Judge Bork ignores or disregards congressional intent of antitrust laws). Accord Areeda, *Introduction to Antitrust Economics*, in ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS 56-57 (E. Fox & J. Halverson eds. 1984) [hereinafter ANTITRUST POLICY] (other possible goals of antitrust law include dispersed economic power, free and multiple choices by producers and consumers, equal opportunity, equitable income distribution, and fairness, but these goals are usually accommodated through antitrust interpretation that focuses on "effective competition which maximizes consumer welfare"); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979) (arguing that antitrust laws were passed not only to minimize product costs to consumers or to prompt efficient markets but also to prevent excessive concentrations of economic power, to reduce chances of concentration requiring greater state involvement in the future, and "to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all"); Spivack, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, in ANTITRUST POLICY, *supra*, at 83, 85 (finding additional antitrust goals of fostering local ownership of business and lessened inequalities in economic conditions).

In adopting the "Chicago School" approach of "efficiency and lowest price uber alles," the Court concluded that defendants could not have engaged in the 20-year predatory pricing scheme because it was "economically irrational" in that it forced defendants to incur a prolonged period of losses in the American market for only the hope of one day recouping these losses through monopoly profits when its American competitors, such as plaintiffs, had been driven from

Matsushita is disturbing as well in that it implicitly suggests that the economic or social theories accepted by the Court majority, even if not based on facts of record in the proceeding, can justify a court ruling for a summary judgment movant as a matter of law when the dispute between the parties is one of fact rather than law. In essence, the Court in *Matsushita* held that, as a matter of law, predatory pricing is so rare and so unlikely when multiple firms are allegedly involved in a conspiracy over an extended period of time that the defendants accused of such a scheme must prevail as a matter of law unless the claimant has direct evidence of illegal activity. Circumstantial evidence, even good circumstantial evidence, and expert opinion, even good expert opinion, seem insufficient to defeat summary judgment under the implicit rationale of the *Matsushita* majority.

The Anglo-American judicial system has long permitted courts to preclude the possibility of some disfavored fact findings at trial by characterizing some items as "matters of law" rather than "questions of fact" since the former were under the control of judges and the latter subject to the occasional vagaries of juries.⁹³ Although

the market. The Court looked only at the financial motives of the defendants in the American market, neglecting to consider the possibility that defendants' worldwide rational economic motives could be served by expanded sales in the United States, even at some loss per sale. The Court disregarded the significant possibility that the defendants could derive a rational gain from increased penetration into the American market even if the losses of cost-cutting were never recouped. See *supra* note 81.

Although many lawyers and economists would generally agree with the authorities cited by the Court for the proposition that predatory pricing will rarely succeed and will seldom realistically threaten either consumers, competition, or competitors, there are other voices in the debate far less skeptical of predatory pricing theories and case histories. See, e.g., Elzinga, *Predatory Pricing: The Case of the Gunpowder Trust*, 13 J. L. & Econ. 223 (1970) (in reviewing federal government's successful action against Gunpowder Trust of the late 1800s, author is unable to conclusively refute allegations of predatory pricing and, while agreeing with Professor McGee that predatory pricing cases should be a low antitrust enforcement priority, finds it more of a threat than does McGee); Scherer, Book Review, 86 YALE L.J. 974, 980-81 (1976) (reviewing R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976)); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869, 890 (1976); Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J. L. & Econ. 129 (1972) (suggesting that predatory pricing is not as unlikely as contended by Professor McGee and citing the English shipping cartel for trade with China during the late 1800s as an example). See also Fox, *Discovering An Economic Consensus*, in *ANTITRUST POLICY*, *supra*, at 107, 108 (finding disagreement among both lawyers and economists as to whether concentration is likely to produce collusive pricing and the likely stability of any such cartel).

Another failing of the *Matsushita* majority's economic analysis is its implicit view of the certainty of the predictions and explanations proffered by an economic theory, even one as influential as that of the Chicago School. Many lawyers and economists have questioned the infallibility of the predictive theories put forth by the Chicago School or any branch of legal economic thought. See, e.g., L. THURLOW, *DAUGHTERS OF THE STATE OF ECONOMICS* (1983); Millstein, *Economics: Use and Misuse—A Response to Professor Areeda*, in *ANTITRUST POLICY*, *supra*, at 61. A further shortcoming of the *Matsushita* opinion is its contribution to what former Yale Law School professor and antitrust expert Gordon Spivack has termed "an increasing tendency for commentators, litigants, enforcement officials, and even some courts to perceive antitrust law as a completely malleable set of rules whose content is governed principally by the decision-maker's concept of the public good" rather than the criteria set forth by statute, rule, or case precedent. See Spivack, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, in *ANTITRUST POLICY*, *supra*, at 83. Spivack, writing in 1984, concluded that few courts had been lured onto the rocks of judicial activism by the siren song of the Chicago School. *Matsushita* has now enshrined this ad hoc judicial policy-making approach to both antitrust and to interpretation of the Federal Rules of Civil Procedure by reinterpreting summary judgment in order to eliminate an antitrust claim viewed as unlikely to succeed and a waste of judicial resources. In effect, the Court enshrined as indisputable the frequently narrow perspective of an often controversial group of writers with whom many disagree. The Court's conclusion that the alleged conspiracy was too implausible to merit trial is also belied by the view of seven (Supreme Court dissenters White, Brennan, Blackmun, and Stevens plus Third Circuit Judges Gibbons and Seitz and Second Circuit Judge Meskill) of the thirteen judges (district, now Third Circuit, Judge Becker and Justices Powell, Burger, Rehnquist, Marshall, and O'Connor) considering the matter who concluded that trial was required.

93. Generally, the reasonableness or negligence of behavior is "construed as invoking the community standard of what the reasonably prudent person would do in the circumstances, and the application of this standard is committed to the community's representatives on the jury." JAMES & HAZARD, *supra* note 11, at § 7.10 (citation omitted). This realm

some "matters of law" had substantial factual components in that the behavior at issue was subject to characterization as "negligent," "justifiable," and the like, they were nonetheless committed to the bench because of the fear that juries would decide these fact-based matters with too much sympathy or emotion and too little rationality. Rather than openly acknowledge this, the system (*i.e.*, a critical mass majority of judges) concluded that some factual inferences were so unlikely that a jury's finding of them would constitute a grave injustice. Consequently, juries were not permitted to decide such issues, which were determined by the bench "as a matter of law."⁹⁴

In much the same vein, the Supreme Court majority in *Matsushita*, in effect, stated that a plaintiff alleging predatory pricing in violation of antitrust law could not possibly be entitled to relief in situations in which a majority of the reviewing judges believed in economic theories that posited that the alleged predatory pricing could not have occurred without achieving more tangible success. Having so decided, the majority then declared plaintiffs' theory of the case implausible as a matter of law⁹⁵ unless contradicted by direct evidence, essentially knowing that there was no such evidence in the record to be discovered on remand.

of questions of fact finding, interpretation, and characterization establishes the boundaries of the "province of the jury." The courts nonetheless place some outer limits on the fact finding, interpretation, and characterization of the jury. As examples: the courts will not permit the jury to find that the sun rose in the west (fact finding contradicted by overwhelming evidence or which court could take judicial notice), or that a reasonable pedestrian would not look at all before crossing a busy street (such behavior, as a matter of law, is not permitted to be characterized as reasonable). See *id.* at § 7.10.

94. See generally F. HARPER, F. JAMES, & O. GRAY, 3 THE LAW OF TORTS § 15.1-15.4, at 339-68 (2d ed. 1986) [hereinafter HARPER, JAMES & GRAY]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 35, at 188-90 (4th ed. 1971); H. SHULMAN, F. JAMES & O. GRAY, CASES AND MATERIALS ON TORTS (3d. ed. 1976).

Thus, in torts, the 19th century jury was often prohibited from rendering a verdict for an injured factory worker who reached into moving machinery. The worker was found contributorily negligent as a matter of law and was thereby barred from recovery. This result did not arise because there was really any "legal" issue about his actions; in actuality the actions were laden with the possibility of differing factual evaluations. See HARPER, JAMES & GRAY *supra*, at § 15.1-15.4. However, some possible fact interpretations were deemed legally incognizable. The bench, socioeconomic cousins of those who owned the mills, uniformly viewed the worker's conduct as more at fault than those who made the machinery or managed the factory and declined to permit some juries to decide otherwise. See generally L. FRIEDMAN, A HISTORY OF AMERICAN LAW 261-64, 409-27 (1973); M. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 94-99 (1977); Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351, 369-70. See also L. KALMAN, LEGAL REALISM AT YALE 1927-60, at 24 (1986) [hereinafter KALMAN] (torts scholar Fleming James concluded that tort doctrine of "last clear chance" was often used to deny recovery as a matter of law for plaintiffs who were contributorily negligent). But see Schwartz, *Tort Law & Economy in 19th Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981) (based on analysis of 19th Century California and New Hampshire cases, author disputes view that legal rules changed to favor rising commerce, finds most courts submitted all issues of care to juries in actions at law).

Other commentators have labeled this dichotomy one of "historical fact" (*e.g.*, was the light green?) and "legal fact" (*e.g.*, was the defendant negligent?). See *Circumstantial Evidence*, *supra* note 27, at 493-94; Schwarzer, *supra* note 19, at 226-28. This Article does not quarrel with the definitional construct of these authors but contests their view of the freedom of courts to take questions of "legal fact" from the jury.

95. The *Matsushita* result underscores the essential accuracy of the observation that "[c]ourts [have not] shown any inclination to fashion decisions which can serve as useful guidelines [as to differentiating questions of fact from law]. [T]he typical appellate opinion today does no more than label the question as one of law or of fact, perhaps citing some authorities which are equally devoid of any more detailed consideration of the point." Weiner, *The Civil Jury and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1867-68 (1966).

In light of the complex happenings at issue in *Matsushita*, the majority's conclusion that no trial judge or jury could believe plaintiffs' explanation looks suspiciously like the justices have made fact findings, a role traditionally forbidden them under rule 56. This is not to say that courts are powerless to eliminate cases based on distorted views of the world. Declaring some fact findings precluded "as a matter of law" serves valid purposes. It is one thing, however, to grant summary judgment against a plaintiff who claims that a jury should be permitted to find no negligence in his driving 150 m.p.h. in a 35 m.p.h. zone. It is quite another to decide without benefit of trial that Japanese corporations possess the same patience (or lack thereof) generally found in American companies and that despite their rising consumer electronics market shares and expert opinion of concerted predatory pricing activity plaintiffs' claims of predatory pricing are so implausible as to prevent even the beginnings of trial testimony.⁹⁶

Indeed, the dissent correctly makes this very point:

[The majority states] "courts should not permit factfinders to infer conspiracies when such inferences are implausible" This language invites the trial judge to go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. . . . No doubt the Court prefers its own economic theorizing to [plaintiffs' experts] but that is not a reason to deny the factfinder an opportunity to consider [the expert's] views on how [defendants] alleged collusion harmed [plaintiffs].⁹⁷

In essence, the dissent viewed summary judgment as a judicial exercise to determine whether the parties' versions of material fact conflicted, not a process of adjudicating which side's version was more probable.⁹⁸

2. *An Analysis of Liberty Lobby on Its Facts and Law*

The District of Columbia Circuit's denial of complete summary judgment in *Liberty Lobby* illustrates the classic application of what had been standard summary judgment practice. Plaintiffs did not contest whether certain defendant conduct had occurred; they argued that the conduct was of such a nature that the factfinder could, in light of all of the facts and circumstances surrounding the case, find these facts to constitute actual malice—reckless disregard for the truth of negative statements about plaintiffs—and that a jury trial was therefore required. The existence of the facts

96. According to one succinct and sensible definition, "questions admitting of only one answer are characterized as questions of law," whereas matters capable of more than one legitimate or legally acceptable determination are questions of fact. See Zuckerman, *Law, Fact, or Justice?*, 66 B.U.L. REV. 487, 493 (1986). Although useful, this distinction does not tell the whole story. See *supra* text accompanying notes 93-94.

97. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, _____, 106 S. Ct. 1348, 1363, 1365 (1986) (White, J., dissenting).

98. In the Agent Orange cases, one apparently effective tactic in encouraging settlement of the class action was the district court's suggestion that it was inclined to grant summary judgment or directed verdict for defendants based upon an insufficient showing of a causal connection between exposure to dioxin and subsequent disease. The court subsequently entered summary judgment against plaintiffs who opted out of the class action settlement. See *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1267 (E.D.N.Y. 1985); see generally Marcus, Book Review, 85 MICH. L. REV. 1267, 1275 (1987) (reviewing P. SHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986)). Some commentators have criticized the court's view of the weight of plaintiff's circumstantial evidence as too strident and an incursion into the jury's sphere of decision making. See, e.g., Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge*, 66 B.U.L. REV. 521 (1986).

themselves may not have been in dispute, but the interpretation of the facts was hotly disputed. Recognizing this, the circuit court denied summary judgment.⁹⁹

The Supreme Court's approach was different and departed from the traditional summary judgment methodology. To the majority, disputes over either fact existence or fact interpretation were not "genuine" within the meaning of rule 56 and did not require even initial trial proceedings unless "the evidence [in favor of the nonmovant] is such that a reasonable jury could return a verdict for the nonmoving party."¹⁰⁰ In other words, the judge must conclude that the fact subject to differing interpretation or the fact subject to differing claims as to its existence would be resolved favorably to the nonmovant and adequately support a verdict for the nonmovant. Prior to *Liberty Lobby*, most courts confined their role to merely ascertaining whether the record showed a nonfrivolous fact existence or fact interpretation dispute.¹⁰¹

The Supreme Court in *Liberty Lobby* evaluated what it felt was the probative value of the facts under interpretative debate. The Court concluded that even the glaringly bad journalistic practices that induced the circuit court to deny complete summary judgment were not, in the majority's estimation, matters that a reasonable jury could find to be clear and convincing evidence of reckless disregard.¹⁰² In other words, the Court removed from the jury one of its traditional roles in litigation—to interpret conduct and decide whether it was "reasonable," "negligent," "reckless," "intentional," "indifferent," "fraudulent," "knowingly false," and the myriad of other fact interpretations that have traditionally been reserved to the jury pursuant to the seventh amendment and traditional federal court practice.¹⁰³

The majority denied that it was permitting too much judicial intervention in the fact-sifting process historically left to the jury. Justice White wrote:

[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine whether there is a genuine issue of trial. . . . [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.¹⁰⁴

This passage alone illustrates the majority's internal contradictions and alteration of the summary judgment rule. On one hand, the Court states that judges should not weigh facts in the course of deciding summary judgment motions. A sentence later, the Court states that a judge must find "sufficient" evidence favoring the nonmovant

99. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1572-79 (D.C. Cir. 1984).

100. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 243, _____, 106 S. Ct. 2505, 2510 (1986).

101. See *infra* text accompanying notes 122-91. Typical of the traditional approach of denying summary judgment when there are fact inferences to be made is *Paul E. Hawkinson Co. v. Dennis*, 166 F.2d 61, 63 (5th Cir. 1948) (when "conflicting inferences may be drawn . . . the matter was not one for summary judgment").

102. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2512-15 (1986).

103. See *JAMES & HAZARD*, *supra* note 11, at §§ 8.1-8.3; *WRIGHT*, *supra* note 17, at 605-18, 627-33 (historic role of the jury under seventh amendment in cases at law was not only to determine what facts existed or were true but also to interpret and characterize the actions of the parties pursuant to the applicable legal standard). Although the judge may, for example, in an automobile accident case determine that a defendant was negligent as a matter of law (e.g., when the driver admits doing 80 m.p.h. in a 30 m.p.h. zone), the jury in these cases traditionally determines not only fact existence but also fact interpretation issues of negligence, recklessness, causation, and the like.

104. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2511 (1986) (citations omitted).

before denying the motion and that only "significantly probative" evidence will accomplish this. How, one may ask rhetorically, can the court determine whether the nonmovant's evidence is sufficient or significantly probative unless the court weighs the evidence? Making the determination more problematic is the Court's insistence that the "clear and convincing evidence" burden of proof be employed at the summary judgment stage. The majority never attempts to answer this or other queries raised in its decision. Indeed, the majority also equates the summary judgment standard with that of the directed verdict,¹⁰⁵ further suggesting that the Supreme Court has now invited trial courts to evaluate the worth of evidence, a function previously reserved to the jury. As more fully discussed in part II(C),¹⁰⁶ the standards for granting summary judgment and directed verdict had previously been viewed as distinct in important respects. In addition, the manner in which the *Liberty Lobby* majority itself evaluated the worth of given facts in rendering the summary judgment itself probably went beyond the discretion customarily accorded trial judges in ruling on directed verdict motions.¹⁰⁷

Reading the circuit court and Supreme Court opinions in *Liberty Lobby*, one wonders whether these are reports of the same libel suit and summary judgment motion. The Supreme Court opinion makes no mention of the undisputed facts upon which the court of appeals based its decision and that seemed, to the circuit court, of sufficient weight that the factfinder might find reckless disregard for the truth and hence actual malice under *New York Times v. Sullivan*.¹⁰⁸ The facts deemed important by the circuit court but unmentioned by the Supreme Court were not merely conceded by the defendants, they were proffered by the defendants.¹⁰⁹

The circuit court specifically noted two primary areas of the case in which it saw a jury issue. One was the author's reliance on a twelve-year-old article published in *True* magazine that provided the *Investigator* piece with several statements alleged to be defamatory. The *True* article was the subject of an earlier libel suit by plaintiffs Carto and Liberty Lobby. According to the circuit court, "[t]he lawsuit ended with a settlement under which *True* paid Carto a sum of money and published a favorable article about Liberty Lobby."¹¹⁰

To thicken the plot, one of the co-authors of the tainted *True* article was an editor of *The Investigator* and was deemed by the circuit court likely to know about the article's post-publication history.¹¹¹ The court of appeals held "that a jury could reasonably conclude that defamatory statements based wholly on the *True* article were made with actual malice" because of the prior defamation action likely known

105. *Id.* at _____, 106 S. Ct. at 2511 ("petitioners suggest, and we agree, that [the summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)").

106. See *infra* text accompanying notes 314-28.

107. See *infra* text accompanying notes 323-28.

108. 376 U.S. 254 (1964).

109. See *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1567 (D.C. Cir. 1984) (facts upon which D.C. Circuit found sufficient evidence of actual malice were contained in defendants' affidavits and depositions submitted in support of defendants' motions for summary judgment).

110. *Id.* at 1566.

111. *Id.*

to the defendants.¹¹² Said the circuit court, “[w]hether the particular statements relied on were false and whether the appellees were actually aware of that falsity are matters for a jury to determine.”¹¹³

A second principal area in which the District of Columbia Circuit found facts that a jury could find constituted subjective actual malice involved the author’s reliance, as detailed in his own affidavit in support of summary judgment, upon a single phone conversation and a draft article by a freelance writer unknown to him.¹¹⁴ The *Investigator* article in question was written largely by staff reporter Charles Bermant. According to the court of appeals:

[One of Bermant’s] major sources was Robert Eringer, a freelance journalist; several of the allegedly defamatory statements were based solely on Eringer’s claims. Bermant never met Eringer and [Bermant’s] deposition recounts only one telephone conversation with him. Eringer sent Bermant a draft of an article containing some information about Liberty Lobby. That draft has since been lost, probably “thrown away.” . . . Eringer never identified any of his sources to Bermant, nor did Bermant inquire. [*Investigator* editor Jack] Anderson testified that it did not matter to him whether Eringer was reliable, for “[w]e did not intend to use his material.”¹¹⁵

The circuit court found, however, that at least five allegedly defamatory statements contained in the article were “based solely upon the conversation with Robert Eringer.”¹¹⁶ The court concluded:

We find that a jury could reasonably conclude that Bermant made these allegations with a disregard for their truth or falsity that constituted actual malice. For one thing, there is only Bermant’s word for the fact that Eringer ever said anything that supports these statements. . . . Moreover, Bermant’s dealings with Eringer display a much lesser degree of care, despite the scurrilous allegations for which he [Eringer] is the sole source. Bermant not only did not inquire how Eringer came to know these details of Carto’s operation; he never even looked the unknown Eringer in the eye until after the story was published, but spoke to him only once over the telephone. Anderson admits that he did not care whether Eringer was reliable. These actions came close to the hypothetical case of actual malice the Supreme Court described in *St. Amant* [*v. Thompson*]: a story “based wholly on an unverified anonymous telephone call.” Eringer was identified by name, but he was in all other respects unknown to the appellees. These allegations, which defendants claim were based solely on Eringer’s assertions, should have gone to the jury.¹¹⁷

Despite then-Judge Scalia’s obvious outrage over what he implicitly regards as sloppy journalism, the point is well taken. A factfinder viewing the circumstantial evidence of the Bermant-Eringer connection might well conclude that Bermant or others for whom defendants were vicariously liable had a reckless disregard concerning the truth of the Eringer-based statements used in the article. The circuit court panel, which also included Circuit Judge Harry Edwards and District Judge Stanley Harris, sitting by designation, went so far as to find the use of the Eringer

112. *Id.* at 1578.

113. *Id.*

114. *Id.*

115. *Id.* at 1567.

116. *Id.* at 1578.

117. *Id.* at 1578–79 (citations omitted).

statements sufficient evidence that a "reasonable jury" could find actual malice and render a plaintiff's verdict.¹¹⁸ The circuit court's discussion is brief on this point, yet it is not unlikely the circuit court saw the Eringer and *True* problems as sufficient to defeat a directed verdict motion.¹¹⁹ Since the court of appeals specifically refused to incorporate the "clear and convincing" evidence burden of proof into the summary judgment stage of trial,¹²⁰ one wonders why the Supreme Court chose to reverse completely the circuit court decision rather than remand for a determination of whether the *True* and Eringer material would preclude summary judgment under the test enunciated by the Supreme Court. The Supreme Court's willingness to scrutinize the record and find remand inappropriate in *Liberty Lobby* is especially odd in light of its choice of remand in *Matsushita*, a case in which the Court presumably "knew" that plaintiffs' search for direct evidence of a conspiracy would be futile.

Overall, the *Liberty Lobby* circuit court opinion is a model of careful, case-specific adjudication. It examines the alleged defamatory statements by category, with special attention given to particular statements at issue in the motion. Defendants obtained summary judgment from the court of appeals on the bulk of the statements at issue. With precision, the circuit court detailed the statements for which summary judgment was not justified on the record. More important, the panel was sensitive to the record and the differing types and sources of the articles' statements. The Supreme Court was not.¹²¹

118. *Id.* at 1578.

119. The District of Columbia Circuit Court opinion can be read as employing at least that part of the Supreme Court's *Liberty Lobby* opinion that equated summary judgment with directed verdict. If this is so, it would support those who contend these two standards were always the same. However, this Article rejects that argument and finds the two standards to be theoretically and practically distinct. See *infra* text accompanying notes 272-328.

Furthermore, even assuming the circuit court operated under the assumption that it was assessing whether the crucial facts to be interpreted could support a reasonable jury's finding of malice, this only illustrates the infirmities of importing directed verdict doctrine to the summary judgment motion. The circuit panel clearly found the plaintiff's evidence worthy of a reasonable jury's deliberation, as well might the three dissenting Supreme Court justices were they to have reached that issue in their dissents. The six-member Supreme Court majority was so unimpressed that it would have granted a directed verdict despite the evidence surrounding the *True* article and Eringer as sources.

If reasonable federal judges can split so strongly in their evaluation of the probative value of evidence, how can there not exist an evidentiary dispute requiring jury consideration? The history of *Liberty Lobby* itself suggests that the *Liberty Lobby* summary judgment standard enables courts to remove from juries matters quite legitimately at issue to reasonable people.

120. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1575-78 (D.C. Cir. 1984).

121. The most charitable construction that can be placed upon the *Liberty Lobby* approach and result is one that strains to isolate *Liberty Lobby* to only the defamation context—a hard task in light of the broad dicta of the majority opinion. However, one defending the narrow view could argue that in *Liberty Lobby*, as in *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), the Court was faced with a mixed question of law and fact—whether the defendant acted with "actual malice"—upon which the Court must make an independent determination in order to protect the first amendment interests at stake.

So charged, the *Liberty Lobby* Court could have then argued that it had reviewed the record on the actual malice issue and determined as a matter of fact evaluation, weighing, and interpretation that defendants could not be found by clear and convincing evidence to have acted with actual malice. This approach may have been taken by the Court sub silentio. However, the Court's opinion fails to acknowledge this and instead elects broad language favoring court evaluation and characterization of proofs at the summary judgment stage while simultaneously protesting that it is not endorsing judicial weighing of the evidence. At a minimum, the *Liberty Lobby* opinion seems to lack candor.

Even if *Liberty Lobby* had been open and explicit about its endorsement of pretrial fact finding and evaluation by the judge, the opinion would nonetheless be subject to criticism as having made these determinations at too early a stage in the proceedings and upon too inadequate a record. See *infra* text accompanying notes 386-408. In *Bose Corp.*, for example, the Court's re-evaluation of the factual issue came after a jury verdict and trial judge consideration of post-trial

a. *Reviewing the Precedents Employed by the Liberty Lobby Majority*

To support its view that summary judgment and directed verdict had always been as one, the *Liberty Lobby* majority relied upon a number of previous Supreme Court cases.¹²² Yet as Justice Brennan observed in dissent, the majority's legal conclusions appear to have "been reached without the benefit of any support in the case law."¹²³ His statement, like almost any other attempt at a black letter pronouncement about summary judgment, goes too far. The majority's citations can be read, albeit in strained fashion, as supporting its conclusions, but do not, if read as a whole and in context, go nearly so far as the pronouncements in *Liberty Lobby* and the treatment of the claim in *Matsushita*. At the minimum, the majority's support in the cited precedent is less than compelling. Some of the cases cited by the majority were actually directed verdict cases that are not directly on point to the summary judgment inquiry.¹²⁴ Others have dicta taken out of context by the majority.¹²⁵ Others have holdings and doctrinal pronouncements that are misstated if not twisted outright in the majority opinion.¹²⁶ In addition, the majority inadequately distinguishes the precedent it acknowledges is adverse to its holding.¹²⁷

The majority, for example, cites *Dombrowski v. Eastland*¹²⁸ and *First National Bank of Arizona v. Cities Service Co.*¹²⁹ as supporting the majority's conclusion that the rule 56 nonmovant must not only set forth evidence of material fact conflicting with that of the movant but also that this evidence must be "significantly probative" to defeat a directed verdict motion and to support a trial verdict for the nonmovant. A neutral reading of these cases produces no such conclusion.

Dombrowski in fact said and implied something quite different regarding summary judgment than the *Liberty Lobby* majority. *Dombrowski*, a procedural tangent of its better known decision concerning federal court injunctive power,¹³⁰

motions, a much richer record upon which an appellate court can review fact or mixed questions of law and fact determinations.

122. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (per curiam); *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949); *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944); *Brady v. Southern Ry.*, 320 U.S. 476 (1943); *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442 (1872). However, *Brady*, *Wilkerson*, and *Munson* were directed verdict cases, not summary judgment cases (in fairness, the Court majority does not suggest they are summary judgment cases but uses them to detail the directed verdict standard) and they discuss only directed verdict doctrine with no mention of summary judgment. Far from buttressing the majority's conclusion equating rules 50 and 56, the absence of any mention of summary judgment in these three directed verdict decisions should lead one to believe that the courts rendering them saw no such intertwinement.

123. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2516 (1986) (Brennan, J., dissenting).

124. See *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944); *Brady v. Southern Ry.*, 320 U.S. 476 (1943); *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442 (1872).

125. See *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (per curiam); *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944).

126. See *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (per curiam); *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464 (1962); *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944).

127. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464 (1962). These cases are generally seen as "high water marks" of Supreme Court jurisprudence taking a restrained approach to summary judgment. For a discussion of these cases, see *infra* notes 154-59, 183-91 and accompanying text.

128. 387 U.S. 82 (1967).

129. 391 U.S. 253 (1968).

130. See *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Fiss, Dombrowski*, 86 YALE L.J. 1103 (1977).

reversed a lower court's grant of summary judgment in favor of the chairman and counsel of the Senate Internal Security Subcommittee of the Judiciary Committee. The lower courts had found these defendants immune from damages resulting from the arrests and searches challenged by the plaintiffs, political activists.¹³¹ The Supreme Court reversed, finding that the plaintiffs had raised a factual contention that the counsel had collaborated with the group that actually conducted the arrest, search, and seizure of records.¹³² Paying deference to the "factual refinement which can occur only as a result of trial,"¹³³ the Court reversed the summary judgment as to the subcommittee counsel, finding that plaintiffs' contentions, if proved at trial, would make legislative immunity inappropriate for the counsel.

In reaching this conclusion, the Court did not discuss in detail the nonmovant's evidence of collaboration and hardly treated it as compelling, taking pains to distinguish the showing necessary to avoid summary judgment with that required to defeat a directed verdict. Said the Court:

There is controverted evidence in the record, such as the date appearing on certain documents which respondents' evidence disputes as a typographical error, which affords more than merely colorable substance to petitioners' assertions as to respondent [committee counsel]. We make no comment as to whether this evidence standing alone would be sufficient to support a verdict in petitioners' favor against respondent [committee counsel], or would require a verdict in his favor. But we believe that, as against an employee of the committee, this showing is sufficient to entitle petitioners to go to trial.¹³⁴

The Court, however, did affirm the grant of summary judgment as to committee chairman Senator Eastland, finding that "[t]he record does not contain evidence of his involvement in *any* activity that could result in liability."¹³⁵ *Dombrowski* cannot fairly be read not as equating summary judgment and directed verdict but as distinguishing them. The *Dombrowski* Court's view was that evidence that is more than merely colorable will withstand summary judgment but that this threshold probably falls below the directed verdict standard requiring nonmovant evidence sufficient to support a reasonable jury's verdict.

Cities Service was an antitrust suit¹³⁶ brought by an independent crude oil seller and continued by the executor of his estate¹³⁷ against several oil companies alleging a conspiracy against him in his efforts to sell Iranian oil in the United States. The American oil operations in Iran had been nationalized in 1951 by the new government of Premier Mossadegh, who was later deposed by the return of the Shah of Iran. The

131. *Dombrowski v. Eastland*, 387 U.S. 82, 83-84 (1967).

132. *Id.* at 84.

133. *Id.*

134. *Id.*

135. *Id.*

136. *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1969). Commentators cite *Cities Service* for the proposition that affidavits opposing summary judgment must have at least some probative value. See, e.g., HERR, *supra* note 18, at § 16.1.5; WRIGHT, MILLER & KANE, *supra* note 17, at § 2738. This suggests that a nonfrivolous fact conflict will avoid summary judgment, and that the nonmovant's facts need not be as "substantial" as generally required to withstand a directed verdict motion. See *infra* text accompanying notes 272-328.

137. Plaintiff Gerald B. Waldron, the oil seller, filed his complaint in 1956 and died in 1964 prior to the Court's decision in *Cities Service*. The executor of his estate, the First National Bank of Arizona, was substituted as plaintiff. *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 259 n.1 (1968).

American companies owning these operations objected to Iran's failure to compensate them for this seizure and loss of property. According to plaintiff and others¹³⁸ these companies sought along with others to boycott American purchase of Iranian oil until they were adequately compensated. Defendant Cities Service, one of the smaller "major" oil companies, was alleged not to be an architect of this boycott but rather a participant that at first was interested in buying Iranian oil to which plaintiff held the rights but then backed off as a result of its decision to cooperate with the alleged boycott.

Cities Service moved for summary judgment introducing evidence that it elected to purchase oil from other sources, principally Kuwait, due to the fruit of long-standing negotiations that predated its discussions with plaintiff. One Cities Service official also testified that the company had actively resisted the boycott and gone so far as to seek Justice Department intervention against the boycott.¹³⁹ In response, plaintiff's primary evidence was the showing of the boycott, some ambiguous documents that could perhaps be read as running counter to the company's testimony, and the contention that since plaintiff's oil was offered at an attractive market price, and defendant initially showed interest but then withdrew, a jury could infer from this circumstantial evidence that Cities Service lost interest in plaintiff's oil because of its cooperation with the antitrust conspiracy.¹⁴⁰

The Court found this matter insufficient to create a genuine issue of material fact precluding summary judgment.¹⁴¹ In so holding, the *Cities Service* Court provided some useful rhetoric for the *Liberty Lobby* majority. A reading of *Cities Service* in light of the peculiar facts of the case, however, suggests that even *Cities Service*, the Court's pre-*Liberty Lobby* high water mark of aggressive summary judgment doctrine, did not go so far as *Liberty Lobby*. In *Cities Service*, the Court described in detail the slow, tortuous path of the litigation that had consumed more than eleven years.¹⁴² It also implied that plaintiff's counsel had been less than diligent in prosecuting the matter;¹⁴³ the obvious inference was that plaintiff's lackadaisical counsel had kept a very weak case alive in hopes of obtaining a favorable settlement from a well-heeled corporate defendant.

As to the quality of the evidence actually of record, the *Cities Service* Court, although using language invoking the occasionally fact-evaluative task of the directed verdict, seemed to have concluded that plaintiff's evidence of a conspiracy was not even colorable within the meaning of *Dombrowski* and other Court summary judgment precedents such as *Poller v. Columbia Broadcasting System*.¹⁴⁴ To be sure, *Cities Service* gives comfort to the *Liberty Lobby* majority with language stating that

138. The United States Justice Department had commenced an antitrust action against the alleged major organizers of the alleged conspiracy, a group of oil companies that did not include Cities Service. See also *id.* at 258-62 (setting forth the complex facts of this case).

139. *Id.* at 267.

140. *Id.* at 260-61.

141. *Id.* at 299.

142. *Id.* at 258-62.

143. *Id.* at 264-68.

144. 368 U.S. 464 (1962). For a discussion of this case, see *infra* text accompanying notes 183-91.

what is required for a nonmovant to avoid summary judgment is that "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."¹⁴⁵ Even this language, however, which can be read as suggesting some significant trial judge authority to evaluate the probative force of nonmovant's facts, does not suggest that the nonmovant's facts must be so strong that they would support a reasonable jury's verdict. *Cities Service* said only that the nonmovant must show facts in sufficient conflict to begin a jury trial.

The opinion can as easily be read as suggesting that even evidence seen as weak by the judge would create such a conflict. For example, other portions of the opinion state that the plaintiff had exhibited a "total failure . . . to produce *any* evidence tending to show Cities' participation in a conspiracy to boycott him,"¹⁴⁶ that plaintiff was "unable to point to *any* benefits to be obtained by Cities from refusing to deal with him,"¹⁴⁷ and that plaintiff was not entitled to a "full-dress trial" in "the absence of *any* significant probative evidence tending to support the complaint."¹⁴⁸ Those who wish to read *Cities Service* as did the *Liberty Lobby* majority may likewise point to portions of *Cities Service* that refer to the degree of persuasiveness of nonmovant's evidence and whether the inferences sought by nonmovant are logical and plausible.¹⁴⁹

Cities Service, then, has something for everybody in the summary judgment debate. On the whole, though, the opinion does not give sufficient support to the *Liberty Lobby* majority. *Cities Service* did not overrule *Poller v. Columbia Broadcasting System*, an opinion that decidedly did not equate rule 56 and rule 50.¹⁵⁰ *Cities Service* was itself a five-three decision and must be considered close in light of Justice Douglas' absence and the vigorous dissent by his frequent allies, Justices Black, Brennan, and Chief Justice Warren. Although not directly attacking the majority's dicta on summary judgment doctrine, the dissent pointed to other aspects of the trial record and argued essentially that the Court had overlooked meaningful factual conflicts and the absence of discovery to defer to the trial judge while eliminating a long and complex antitrust trial.¹⁵¹

If hard cases make bad law, they also perhaps make poor precedent. The *Cities Service* case is generally treated by commentators not as an extension of summary judgment doctrine but rather as a statement limiting the dicta in *Poller*.¹⁵² As to the quantum of evidence required by a nonmovant to avoid summary judgment, *Cities Service* is generally treated by the commentators as standing for the proposition that

145. *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

146. *Id.* at 270 (emphasis added).

147. *Id.* at 287 (emphasis added).

148. *Id.* at 290 (emphasis added).

149. *Id.* at 288-89.

150. See *infra* text accompanying notes 183-91.

151. *First Nat'l Bank of Ariz. v. Cities Serv. Co.* 391 U.S. 253, 300-04 (1968).

152. See 2 P. AREEDA & D. TURNER, *ANTITRUST LAW* § 316, at 58-65 (1978); WRIGHT, MILLER & KANE, *supra* note 17, at § 2732.1; Sonenshein, *supra* note 18, at 791-92; (suggesting that *Cities Service* was primarily an effort to limit *Poller* from discouraging too much the use of summary judgment in antitrust cases).

a nonmovant's affidavits or other facts must have at least some modicum of probative value, but not that the probative force must be sufficient to resist a directed verdict motion or that the judge may assess the persuasiveness of the nonmovant's evidence.¹⁵³

In addition, the *Liberty Lobby* majority cited *Adickes v. S. H. Kress & Co.*,¹⁵⁴ along with *Dombrowski* and *Cities Service*, as supporting its view of summary judgment as congruent with the directed verdict. A fair reading cannot stretch *Adickes* so far. *Adickes* was an action brought by an Alabama teacher under 42 U.S.C. section 1983 alleging that her groundless arrest on charges of vagrancy upon leaving a segregated lunch counter after being refused service when in the company of her black students resulted from a conspiracy between store management and the police.¹⁵⁵ The district court granted defendants' summary judgment motion based on affidavits from the arresting officer and store manager denying the existence of a conspiracy. Plaintiff had presented in opposition to the motion an affidavit stating that the policeman was in the store prior to the arrest and had opportunity to confer with store management.¹⁵⁶ Plaintiff argued that this presented sufficient evidence from which a jury could infer concerted action and conspiracy. The Fifth Circuit disagreed, affirming the grant of summary judgment.¹⁵⁷ The Supreme Court, however, found plaintiff's argument persuasive and reversed the summary judgment.¹⁵⁸

The facts of the case were not so much in dispute as they were capable of multiple interpretations. In essence, the Court concluded that picking the "correct" interpretation was the jury's job. From the facts and law of *Adickes*, one is hard pressed to see how this case, which vested substantial fact interpreting power in the jury, supports the *Liberty Lobby* (and *Matsushita*) majority view that a judge may decide rule 56 motions by rejecting certain fact interpretations as insufficiently probative or by finding certain facts favoring the nonmovant insufficient in magnitude to overcome the movant's evidence.¹⁵⁹

The *Liberty Lobby* Court then cited several cases as to the standard for deciding directed verdict motions.¹⁶⁰ The majority took no liberties with those cases.

153. See HERR, *supra* note 18, § 16.1.5, at 350 (*Cities Service* cited for proposition that affidavits opposing summary judgment must have at least some probative value and must be admissible in evidence, but not reading *Cities Service* as permitting a court to compare probative value of nonmovant's evidence with that of movant); WRIGHT, MILLER & KANE, *supra* note 17, at § 2738.

154. 398 U.S. 144 (1970). See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2510-11 (1986).

155. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 146-49 (1970).

156. *Id.* at 153.

157. *Adickes v. S.H. Kress & Co.*, 409 F.2d 121 (25th Cir. 1968).

158. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970).

159. From the case reports, it appears that *Adickes*' strongest evidence of a conspiracy to deprive her of her civil rights was the presence of a police officer in the store and the chance that the officer and the store manager may have collaborated. *Adickes* avoided summary judgment in 1970. In 1986, plaintiff *Liberty Lobby* detailed several concrete items of admissible evidence showing that some of the defamatory comments in the challenged articles came from what a reasonable person might regard as suspect sources. See *supra* text accompanying notes 110-21. *Liberty Lobby*, of course, lost the case on summary judgment. Unless one accepts the view that the plaintiffs' identities affected the results (*i.e.*, civil rights-oriented teachers win and right-wing organizations lose), the disparity of the records and results shows how much the Court's attitude toward summary judgment has changed in 16 years.

160. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2511-12 (1986) (citing *Brady v.*

Nonetheless, it seems odd for the Court to have devoted so much discussion to directed verdict jurisprudence when it was faced with a summary judgment motion in the instant case. If, as the majority asserted, the standards governing the directed verdict and summary judgment motions are really (and always have been) the same, one may legitimately ask why the majority did not cite any bona fide summary judgment cases enunciating the "evidence sufficient that a reasonable jury could so find" standard. The short answer is that the Court had no such summary judgment cases to cite. Only directed verdict cases were available for the task because only in directed verdict cases was the "what a reasonable jury could find" standard employed. Prior to *Liberty Lobby*, this analysis did not figure prominently in summary judgment jurisprudence.

The closest such precedent cited by the *Liberty Lobby* majority was a footnote in a little known case, *Bill Johnson's Restaurant v. NLRB*,¹⁶¹ which the majority cited as suggesting that the primary differences between summary judgment and directed verdict were the times at which they are ordinarily made and the type of evidence upon which they are made.¹⁶² This statement itself suggests significant differences between the two motions in that one is usually based on documentary evidence and the other upon testimonial or other trial evidence. While the *Liberty Lobby* majority

Southern Ry., 320 U.S. 476, 479-80 (1943); *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949); and *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442 (1872)). None of these cases involved review of a grant of summary judgment. None of them offer any legal argument affirming the *Liberty Lobby* majority. Furthermore, a persuasive case can be made that *Brady* was wrongly decided and that *Wilkerson* argues against the result in *Liberty Lobby* and *Matsushita*.

The basic legal standard for the directed verdict in *Brady* is well-known. The Court stated that a directed verdict is proper "[w]hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict." *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943). On the merits, however, *Brady* was a judgment n.o.v. case, reversing a jury's finding for the plaintiff and against defendant railroad for negligence. As demonstrated by Justice Black, writing for four dissenters, the Court clearly determined credibility issues in a manner adverse both to the claimant and to the jury's finding by disregarding plaintiff's expert testimony concerning negligence. Indeed, the Court made its own determination as to the proximate cause of plaintiff's death, disregarding as well plaintiff's fact witnesses about common railroad activity. *Id.* at 485-89.

In *Wilkerson*, the Court, this time with Justice Black writing the majority opinion, reversed a directed verdict in favor of the defendant railroad because the directed verdict was granted in the face of conflicting evidence that might justify either a plaintiff's or defense verdict. The *Wilkerson* Court adopted a view contrary to *Matsushita* and *Liberty Lobby*, stating that "[i]t is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949). There were no dissents, although the concurring opinion of Justice Frankfurter could be read as stopping short of the sweeping pro-jury thrust of Justice Black's opinion. However, Justice Douglas' concurrence, joined by Justices Murphy and Rutledge, all dissenters in *Brady*, can be read as going further than the majority in its distaste for aggressive directed verdict doctrine. Justice Douglas noted with apparent approval the Court's use of certiorari grants to curb excessive court zeal in taking FEHA cases from the jury. *Id.* at 69-70 (Douglas, J., concurring).

Munson set forth the well-known dictum, quoted at length in *Liberty Lobby* (see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2511 (1986)), that a judge was not required to submit a question to the jury merely because there was some scintilla of evidence in claimant's favor but that there must be sufficient evidence favoring claimant to support a reasonable jury's verdict. *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1872). Other than its historical role as marking the Court's transition from the "scintilla" rule to the "substantial evidence" rule for directed verdicts, *Munson* has little to offer the modern debate over summary judgment.

The *Liberty Lobby* Court also cited *Pennsylvania Ry. v. Chamberlain*, 288 U.S. 333 (1933); *Coughran v. Begelow*, 164 U.S. 301 (1896); and *Pleasants v. Fant*, 89 U.S. (22 Wall.) 116 (1875), all directed verdict cases, as supporting its contention that the summary judgment and directed verdict standards were equivalent. None of these cases supports the assertion of the *Liberty Lobby* Court.

161. 461 U.S. 731, 745 n.11 (1983).

162. *Id.* at 745-46 nn.11-12.

treated the distinctions as trivial, trial lawyers and judges appreciate the difference.¹⁶³ In addition, *Bill Johnson's* characterized the rule 56 and rule 50(a) standards as "very close"¹⁶⁴ but it did not equate them as did the *Liberty Lobby* Court. To the extent that the *Bill Johnson's* footnote overlooked the judge's inability to weigh credibility of witnesses or the probative value of facts at the summary judgment stage of trial, it was in error.

The *Liberty Lobby* majority also cited dicta from *Sartor v. Arkansas Natural Gas Corp.*,¹⁶⁵ to the effect that "summary judgment should be granted where the evidence

163. As discussed in section III(D), see *infra* text accompanying notes 386-408, the quality of documentary and testimonial proof is quite different and the later timing of the directed verdict motion provides a much richer data base upon which a court can base its decision. Claims that look weak on paper or seem counterintuitive when first pleaded can begin to look compelling when established by real witnesses just as seemingly plausible defenses can crumble under trial cross-examination.

164. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983). The *Bill Johnson's* Court also proclaimed that "[i]n the civil context, most courts treat the two [directed verdict and summary judgment] standards identically, although some have found slight differences." *Id.* (citing *WRIGHT, MILLER & KANE*, *supra* note 17, at §§ 2532, 2713.1 and *J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE* ¶¶ 50.03[4], 56.04[2] (1982) [hereinafter *MOORE*]). This statement is at best only half correct. As discussed in section II(C), see *infra* text accompanying notes 272-313, commentators such as *Wright, Miller, & Kane* and *Moore* had noted the theoretical similarities between directed verdict and summary judgment but had also noted significant practical differences in the way courts decide the motion. Neither of the sources cited in the *Bill Johnson's* footnote states or even intimates that "most courts" equate the two standards. On the contrary, both of these commentators can be more fairly read as suggesting that most courts treat summary judgment and directed verdict dissimilarly.

Read as a whole, *Bill Johnson's* gives little real support to the *Liberty Lobby* majority and can be easily read as antithetical to the *Liberty Lobby* holding. *Bill Johnson's* involved a labor dispute in which a waitress who had filed an unfair labor practice claim and picketed against a restaurant claimed that the restaurant's subsequent suit against her for defamation was retaliatory and baseless. She sought National Labor Relations Board (NLRB) intervention and protection against the suit. After a hearing, an NLRB administrative law judge (ALJ) examining the evidence in support of the employer's claim found the claim baseless and enjoined the employer from further prosecution. According to the Court:

The ALJ reached his conclusion that petitioner's state suit lacked a reasonable basis "on the basis of the record and from [his] observation of the witnesses, including their demeanor, and upon the extensive briefs of the parties." In the view of the ALJ, the "evidence fail[ed] to support" the [employer's] complaint's allegations that the picketers clogged the sidewalks, harassed customers, or blocked entrances and exits to the restaurant. The libel count was deemed baseless because "the evidence establishe[d] the truthfulness" of everything stated in the leaflet.

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 736 (1983) (citations omitted).

The NLRB adopted these findings with minor exceptions and enjoined the employer's suit. The Ninth Circuit affirmed the Board's order. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 660 F.2d 1335 (9th Cir. 1981). The Supreme Court vacated and remanded the order, finding that the ALJ and the NLRB had conducted too searching an inquiry into the merits of the employer's lawsuit. Rather, the Court stated that the Board's role in determining whether such litigation was sufficiently "baseless" to warrant injunction was akin to a trial court's approach in deciding a motion for summary judgment.

Specifically, the Board should not deem an action baseless "if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts" *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744-45 (1983). To go beyond this inquiry would, according to the *Bill Johnson's* Court, "usurp the traditional factfinding function of the state-court jury or judge." *Id.* at 745 (citation omitted). In other words, the Supreme Court in *Bill Johnson's*, although equating the summary judgment and directed verdict standards in dicta, displayed an understanding of "genuine issue of material fact" quite a bit more restrictive than that shown in *Matsushita* and *Liberty Lobby*.

To the *Bill Johnson's* Court, a tribunal applying the rule 56 standard could not evaluate the facts in conflict, could not pass on witness credibility, and could not deem a requested inference or theory of the case "foreclosed as a matter of law" or "otherwise frivolous" if "there is any realistic chance that the plaintiff's legal theory might be adopted." *Id.* at 746-47. Applying this standard, could one really conclude with such certainty that there was no realistic chance that a factfinder would find a long-term conspiracy in *Matsushita* or view some of the *Liberty Lobby* defendant's actions as displaying reckless disregard for the truth of the articles in question? I think not, and the *Bill Johnson's* Court's elaboration suggests it thought not as well. See *id.* at 746 n.12.

165. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2512 (1986) (quoting *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944)).

is such that it 'would require a directed verdict for the moving party.'"¹⁶⁶ Although this statement standing alone provides aid and comfort to the *Liberty Lobby* majority, the *Sartor* case as a whole contradicts the Court's approach in *Liberty Lobby*. *Sartor* involved a mineral lessor's claim that the lessee had underpaid him royalties due for the extraction of natural gas from his property. Whether the plaintiff had received the proper royalty amounts turned on the issue of the correct wellhead price for natural gas at the time it was extracted from plaintiff's property.¹⁶⁷ The case had an unusual procedural history. After the initial claim, a jury trial verdict for plaintiff found the wellhead price for the time in question to be four and one-half cents per thousand cubic feet rather than the three cents per thousand upon which defendant had paid plaintiff.¹⁶⁸ The resulting judgment for plaintiff was reversed in part by the circuit court on statute of limitations grounds and the case remanded for a determination of wellhead price for a redefined time period.

On remand, the defendant moved for summary judgment that the wellhead price as established by a defined market did not exceed three cents per thousand cubic feet during the time in question. The motion was supported by affidavits of eight persons, all either employees of the defendant or employees of other natural gas companies with similar interests to those of the defendant company. These same affiants had testified, apparently unpersuasively, in the preceding trial. Defendant also proffered documents from the Federal Bureau of Mines that showed the lower market wellhead price for the state as a whole and also produced other contracts suggesting the lower wellhead price.¹⁶⁹ From the case reports, it appears that the plaintiff offered in rebuttal of the motion only the affidavit of its attorney, contending that the jury could infer a higher wellhead price from the contracts in question and other circumstances. The trial court granted summary judgment,¹⁷⁰ which was affirmed by the Fifth Circuit,¹⁷¹ on the ground that, as a matter of law, the market wellhead price would control if it was established that a market price existed. The district and circuit courts found no dispute in the record that a market price existed and that the market price never exceeded three cents per thousand cubic feet during the time in question. The Supreme Court reversed.

Aside from the lawyer's affidavit, it appears from the case reports that plaintiff submitted next to nothing in opposition but rather rested upon pointing out the interested character of defendant's affiants and the portions of the earlier trial record in which plaintiff's "evidence," whatever it may have been, was sufficient to convince a jury of the higher wellhead price. From the descriptions in the case reports, the admissible evidence favoring the nonmovant in *Sartor* seems less than that supporting the nonmovants in *Matsushita* and *Liberty Lobby*. Nonetheless, the *Sartor* Court, which supposedly was employing the approach of the *Liberty Lobby* majority, found nonmovant's contentions sufficient to avoid summary judgment. The

166. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 621 (1944).

167. *Id.* at 621-23.

168. *Id.* at 624-26.

169. *Id.*

170. *Sartor v. Arkansas Natural Gas Corp.*, 46 F. Supp. 111 (W.D. La. 1942).

171. *Sartor v. Arkansas Natural Gas Corp.*, 134 F.2d 433 (5th Cir. 1943).

Sartor Court, in an approach similar to that of the *Adickes* Court, placed considerable emphasis on the interested status of the movant's affiants¹⁷² and the need for trial proceedings to allow an informed decision of whether these interested affiants were telling the truth.¹⁷³ Said the Court:

There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are [sic] to be guided in determining the weight and credibility of his testimony. That part of every case, such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and, so long as we have jury trials, they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function.

* * *

It may well be that the weight of the evidence would be found in a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner.¹⁷⁴

The *Sartor* Court cited a string of earlier Supreme Court cases to the effect that affidavit "opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury . . . or a judge . . . or a statutory board."¹⁷⁵ The Court also approvingly quoted earlier language that "if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony."¹⁷⁶

The *Sartor* dissenters, Chief Justice Stone and Justice Reed, did not dispute the majority's solicitude for the jury or its general summary judgment analysis. Instead, they viewed the record quite differently, as revealing no evidence of damages favorable to the plaintiff.¹⁷⁷ The dissent also took a different view of movant's evidence, finding only some of it to be sufficiently interested to be disbelieved by the jury on that ground alone.¹⁷⁸ Since there was disinterested evidence for the movant and no contrary evidence for the nonmovant, the dissent saw no genuine issue of material fact and would have affirmed the summary judgment. Nowhere does the dissent suggest that the trial or appellate courts may deem one side's evidence more persuasive than the other's or that the judge must believe one side's affiants because their testimony is more plausible than that of the nonmovant. The Supreme Court

172. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 624-26 (1944).

173. *Id.* at 627-28 (citation omitted).

174. *Id.* at 628-29 (citation omitted).

175. *Id.* at 627 (citation omitted).

176. *Id.* at 627 (quoting *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878)). *Spring Co.* was a directed verdict case. The *Sartor* Court's approving quotation of *Spring Co.* for the proposition that even in this context the evaluation of conflicting facts was for the jury rather than the judge can be read as evidencing the Court's view that the directed verdict standard, although empowering the judge to conclude that no reasonable jury could find for the claimant, restricted the judge's ability to reach that conclusion for cases in which the nonmovant had actually submitted evidence in conflict with that of the movant. In other words, one can read the directed verdict jurisprudence of *Sartor*, as well as its summary judgment jurisprudence, as barring the judge from evaluating conflicting facts and forming conclusions as to which facts were stronger or more probative.

177. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 629-30 (1944).

178. *Id.* at 631.

dealt not at all with the issue of greatest concern to the lower courts: whether an open market price, if established, must be accepted as the controlling price as a matter of law.

Thus, despite the single bit of dicta referring to directed verdict, *Sartor* simply cannot be fairly read as supporting either the express *Liberty Lobby* or the implicit *Matsushita* approach. *Sartor*, read as a whole, fits more comfortably within the *Adickes* and *Poller v. Columbia Broadcasting System*¹⁷⁹ line of summary judgment cases as well as pro-jury cases such as *Beacon Theatres v. Westover*¹⁸⁰ and *Dairy Queen v. Wood*¹⁸¹ that placed great importance not only on the litigant's right to a jury trial but also upon the possibility that a jury, at trial, could evaluate questions of fact, interpretation, and liability differently than a judge scanning a paper record.

The *Liberty Lobby* majority, in its primary discussion of summary judgment and directed verdict,¹⁸² fails to mention a leading Supreme Court case, *Poller v. Columbia Broadcasting System*.¹⁸³ Later in the opinion,¹⁸⁴ the majority acknowledges *Poller* by reference to plaintiffs' reliance on the case. The majority then proceeds to misstate both the import of *Poller* and the application of *Poller* to the facts of *Liberty Lobby*. *Poller* was an antitrust case in which plaintiff alleged that CBS and others had conspired to monopolize television broadcasting. After discovery, defendants moved for summary judgment, which was granted by the district court¹⁸⁵ and affirmed by the District of Columbia Circuit.¹⁸⁶ The Supreme Court reversed, denying summary judgment in a five-four decision that many criticized as too deferential to nonmovants,¹⁸⁷ particularly the Court's statement that summary judgment "should be used sparingly in complex antitrust litigation."¹⁸⁸ The *Poller* opinion was, nonetheless, the law. Furthermore, although commentators saw little justification for different application of rule 56 in large, complex, or antitrust cases, most agreed with statements in *Poller* that summary judgment was generally less appropriate in cases in which motive and intent were important, in which the proof was largely in the possession of the defendants where it was likely to remain despite discovery, in which a factfinder's trial-based assessment of credibility was likely to be useful in determining truth, and in which the grant of summary judgment meant absence of jury consideration.¹⁸⁹

According to the *Liberty Lobby* majority, plaintiffs relied on *Poller* to suggest that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete

179. 368 U.S. 464 (1962).

180. 359 U.S. 500 (1959).

181. 369 U.S. 469 (1962).

182. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2510-12 (1986).

183. 368 U.S. 464 (1962).

184. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2514 (1986).

185. *Poller v. Columbia Broadcasting Sys.*, 174 F. Supp. 802 (D.D.C. 1959).

186. *Poller v. Columbia Broadcasting Sys.*, 284 F.2d 599 (D.C. Cir. 1960).

187. See, e.g., WRIGHT, MILLER & KANE, *supra* note 17, at § 2725 n.27 (including *Poller* among group of cases requiring a clear showing of truth before summary judgment granted).

188. *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962). See also WRIGHT, MILLER & KANE, *supra* note 17, at § 2732.1.

189. See WRIGHT, MILLER & KANE, *supra* note 17, at §§ 2725, 2732, 2732.1.

evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice.¹⁹⁰ According to the circuit court, plaintiffs had pointed to concrete evidence of defense conduct that a jury could deem in reckless disregard of information published by defendants.¹⁹¹ In short, the cases employed by the *Liberty Lobby* majority, although adding the cosmetic authority of italics to the Court's opinion, do not support the Court's assertions or its departure from accepted rule 56 practice.

B. The "Real Meaning" of Rule 56

1. The Text of the Rule

Although interpretation of a written text is often difficult,¹⁹² lawyers, scholars, and judges for the most part have agreed upon the ground rules and approaches that should govern interpretation. In particular, the proper modes of interpreting statutes and rules that can be relatively easily amended (compared to a constitution) are generally widely held. When interpreting a rule of procedure, a court normally begins with the text of the rule and the "plain" or ordinarily understood meaning of its words.¹⁹³

190. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2514 (1986).

191. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1577-79, (D.C. Cir. 1984). "We find that a jury could reasonably conclude that defamatory statements based wholly on the *True* article were made with actual malice." *Id.* at 1578.

192. See G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31-43 (1982). Textual interpretation is especially difficult and controversial in the context of the federal Constitution. For example, after 200 years, the debate continues to rage regarding the apt method for interpreting the Constitution. Compare Monahan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 374-75 (1981) (arguing that constitutional language should be interpreted as the words were intended to be understood by Framers and that the "language constitutes the best evidence of original intentions") with Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1983) (arguing that factors other than language have a vital role in constitutional interpretation). The controversy occasioned by the Reagan Administration's originalist view of constitutional law has hinged more on disputes over the means and difficulty of discerning intent (see, e.g., Rakove, *Mr. Meese, Meet Mr. Madison*, ATLANTIC MONTHLY, Dec. 1986, at 77, 85) and differing views of the nature of a constitution as opposed to statutes in light of their different purposes and the longer time period in which constitutional language will remain unchanged. Nonetheless, Attorney General Meese's campaign notwithstanding, few legal scholars have embraced a strict "originalist" interpretation of the Constitution. See Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480-81 (1987) (most authorities agree that constitutional interpretation should be "dynamic" in adjusting to developments since 1787 but attempt to preserve basic intent of the provision under scrutiny).

193. See G. CALABRESI, *supra* note 192, at 31-34. See also Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982) (discerning Supreme Court trend to look primarily at "plain meaning" of a statute under construction and to base interpretation on this alone unless language ambiguous, also finding less Court concern for legislative history or other indices of intent when language is reasonably clear). But see Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808 (1983) (suggesting that beginning at the text is the officially recognized method of construction but that "more often than not the judge—the good judge as well as the bad judge—in fact begins somewhere else").

Dean Calabresi endorses a jurisprudence that would permit courts, in certain circumstances, to overrule or modify statutes inconsistent with the "legal topography" rather than twist language, legislative history, or other factors in order to achieve a "better" interpretation but one that is at bottom inconsistent with that of the legislature that enacted the statute. Professor Eskridge stops short of endorsing the Calabresi approach but argues for sufficient judicial freedom to infuse interpretation with values gleaned from intervening legal developments. His proposed "dynamic" interpretation of statutes seems quite consistent with the Calabresi view of a judicial role for both updating statutes and avoiding unfair or absurd results through literal intentionalism.

Of course, the rules and process of interpreting statutes or any other text are hardly as cut-and-dried as this Article

Although rule 56 is divided into seven subparts,¹⁹⁴ the substantive “heart” of the summary judgment rule is found in rule 56(c), which states:

suggests in approaching the interpretation of rule 56. A complete discussion is beyond the scope of this paper. Although different approaches abound, there exists sufficient consensus to state broad ground rules for attempting to discern the real meaning of the summary judgment rule. This Article suggests that for purposes of construing rule 56, interpreters should first examine the plain meaning of the rule’s text, then (if necessary) its legislative history, then (if necessary) the environment in which the rule was formed, including contemporaneous writings by its drafters and application by courts. As the analysis in the text shows, interpretation of rule 56 by these methods does not result in the construction of rule 56 reached by the Court in 1986. The logical next step of interpretation is to ask whether the rule 56 enacted in 1938 and updated in 1963 is inconsistent with the current legal topography. For reasons discussed in part III, *see infra* text accompanying notes 329–408, this Article concludes that the rule remains vibrant as originally intended. Were it not, the Court could amend rule 56 rather than misconstrue it.

Some may argue that this approach is incorrect and that another method of text construction is more apt to the inquiry. However, my proposed methodology is consistent with both the “plain meaning” rule that the Court appears to have embraced in other contexts and the prevailing legal process methodology of construing texts according to the intent of the drafters as discerned from textual language, legislative history, and other reliable indicia of intent. G. CALABRESI, *supra* note 192, at 31–43, 204–15. *See* H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1200, 1410 (1958). Although placing a slightly different emphasis on the relative importance of language vis-a-vis other evidence of intent, most commentators are in accord with the Hart and Sacks approach. *See, e.g.,* R. KEETON, *VENTURING TO DO JUSTICE* 78–97 (1969); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 30 (1957); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 262–65 (1973).

More recent writings concerning interpretation do not suggest a compelling need to diverge from what I term the “basic” approach for purposes of understanding rule 56. For example, Ronald Dworkin, in *LAW’S EMPIRE* 313–54 (1986), suggests that statutes should be interpreted similarly to common law with courts finding the optimum meaning in light of current circumstances and the case at hand. Dworkin’s approach deals with statutes, not rules largely made by the court and updated on a virtually rolling basis as are the Federal Rules of Civil Procedure. In addition, like Calabresi’s, his view has been criticized as vesting too much power in courts in derogation of the legislature. *See* Eskridge, *supra* note 192, at 1479–82. Eskridge envisions a judicial role more constrained by textual language and other clear showings of intent than do Calabresi and Dworkin. Recent law and economics scholarship that tends to view lawmaking as the result of a bargain between interest groups and the legislature, *see, e.g.,* Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986), seems inapposite to an analysis of the Federal Rules, which are not sui generis laws resulting from classic, overt political activity as are most statutes. Similarly, deconstructionist or Critical Legal Studies approaches to interpretation seem similarly inapposite to discerning the proper interpretation of rule 56. For rule 56, like the vast majority of construction problems, the basic text-legislative history-other evidence of intent trilogy should suffice to illuminate both meaning and the wise result in particular cases.

This Article suggests that the Federal Rules, because they are largely court-made as well as being regularly revised and capable of relatively easy specific revision present a less compelling case for interpretation according to any method requiring more pronounced judicial attempts to be dynamic, update the rule, or reach out to complete gaps in the rule. *See infra* text accompanying notes 331–44.

194. Rule 56 is divided into seven major subparts. Rule 56(a) and 56(b) are essentially ministerial and technical, establishing the timing by which claimants and defendants may operate in seeking summary judgment. Rule 56(a) provides that a claimant, counterclaimant, cross-claimant, or declaratory judgment applicant may seek to recover via summary judgment, but must wait until 20 days after commencement of the action. *See* Southern Pac. Transp. Co. v. National Molasses Co., 540 F.2d 213 (5th Cir. 1976). Rule 56(b) provides that a party defending a claim may move for summary judgment at any time after commencement of the claim. *See* HERR, *supra* note 18, § 16.13, at 345. A portion of rule 56(c) also regulates timing, requiring that the motion be served upon the opposition at least ten days before a hearing on the motion is held or a decision is rendered. The language of rule 56(c) implicitly suggests that a hearing is required prior to decision on the motion. Cases interpreting this portion of the rule have found that the “hearing” need only be an opportunity for oral argument by the parties and that an evidentiary hearing replete with live, sworn witnesses is not required. *See* Spark v. Catholic Univ. of Am., 510 F.2d 1277 (D.C. Cir. 1975) (no need for hearing on rule 56 motion when court finds sufficient information in pleadings, motions, supporting papers, and no utility in holding a hearing). *See also* Smart v. Jones, 530 F.2d 64 (5th Cir. 1976) (informal conference in chambers satisfies hearing requirement of rule 56); HERR, *supra* note 18, § 16.14, at 348. *But see* Pierce, *supra* note 25, at 291 (noting that courts may hold hearing pursuant to rule 43(a) to resolve factual issues and then apply rule 56 analysis to determine the facts). In the vast majority of cases, the summary judgment hearing consists only of oral argument and the possible submission to a court of additional affidavits or documents. Another part of rule 56(c) specifies that summary judgment as to liability alone is interlocutory in character and thus does not constitute a final trial court order that would be immediately appealable as a matter of right. 28 U.S.C. § 1291 provides that only final orders are appealable as of right unless they involve injunctive relief. Although interlocutory review is permitted by the federal courts under certain circumstances (*see* HERR, *supra* note 18, § 25.9, at 589–91), these exceptions to the final order rule are seldom applicable to denials of

[After the making of the summary judgment motion] the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.¹⁹⁵

Rule 56(e) also contains a substantive passage, which must be read in conjunction with rule 56(c), and provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.¹⁹⁶

The bulk of cases deciding summary judgment motions have focused on whether there exists on the record a “genuine issue as to any material fact.”¹⁹⁷ Specifically, courts have worried about the meanings of the words “genuine” and “material.” Increasingly in recent years, courts have also closely examined rule 56(e) to determine whether a nonmovant’s submissions really state admissible facts opposing the motion or whether they are merely redressed allegations of the complaint.¹⁹⁸ Courts have also recently begun to focus on rule 56(e)’s language requiring the

summary judgment or entry of partial summary judgment as to liability alone. The remainder of rule 56(c) deals with the substantive standard for granting the motion and is discussed below.

Rule 56(d) provides for partial summary judgment as to select facts or claims. A part of rule 56(e) establishes the proper format for the submission of affidavits and documents in connection with summary judgment motions. The more substantive portion of rule 56(e), like that of rule 56(c), is discussed below. Rule 56(f) authorizes the court to grant the nonmovant additional time and discovery in order to have fair opportunity to make a record in opposition to the motion. Rule 56(g) provides that when an affidavit is made in bad faith or for delay, the offending party may be held in contempt or required to reimburse the opposition for expenses incurred, including attorney’s fees, because of the offending affidavit.

195. FED. R. CIV. P. 56(c).

196. FED. R. CIV. P. 56(e). To some extent, the technical requirements of rule 56(e) as to affidavit form can also be crucial. Rule 56(e) provides that affidavits must be made on personal knowledge by one competent to testify, must include legitimated copies of documents referred to in the affidavit, and must set forth facts that would be admissible in evidence.

A nonmovant’s affidavit may state, for example, many “facts” that would militate against summary judgment. However, if those averments are not admissible at trial, summary judgment may nonetheless be entered against the nonmovant. Because the bulk of summary judgment affidavits are made by parties to the litigation or their representatives, the question of admissibility infrequently affects the court’s decision. In more involved cases, however, it may be crucial. For example, in *Matsushita*, see *supra* text accompanying notes 33–51, the summary judgment question turned on, at least for the district and circuit courts, whether the facts contained in the affidavit of plaintiffs’ proposed expert witnesses were (a) inadmissible hearsay discussion of documents [the trial court’s view]; or (b) admissible evidence reasonably relied upon by experts [the appellate court’s view].

197. See, e.g., *Lunden v. Cordner*, 354 F.2d 401 (8th Cir. 1966) (no material issue regarding decedent’s intent to change insurance beneficiary); *Streeter v. Erie R. Co.*, 25 F.R.D. 272 (S.D.N.Y. 1960) (issue as to whether plaintiff was employee at time of injury). See also M. ROSENBERG, H. SMIT & H. KORN, *ELEMENTS OF CIVIL PROCEDURE* 689–90 (4th ed. 1985) (what constitutes genuine issue of material fact is apt to be one of “most perplexing” summary judgment questions for courts).

198. See e.g., *Therrien v. United Air Lines, Inc.*, 670 F. Supp. 1517 (D. Colo. 1987). The district court applied this focus in granting the summary judgment that was eventually upheld in *Matsushita v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1139–44 (E.D. Pa. 1981). Although this approach is not new and to some extent predates the 1963 amendment to rule 56(e) (see *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952)), courts appear to be focusing on rule 56(e) to a greater extent by requiring nonmovants to produce not only evidence in controversy but evidence that requires the further adjudication of trial.

nonmovant to show that there exists "a genuine issue for trial" as evidence that the summary judgment standard closely resembles that for directed verdict.¹⁹⁹

Although the universally accepted interpretation of the word "hearing"²⁰⁰ in rule 56 as meaning only "oral argument" rather than "evidentiary hearing" shows that courts do not focus with tunnel vision on only the text of a rule, most respected legal analysts agree that the text of a rule is the proper place to begin interpretation and that the plain and commonly understood meaning of words used in the text deserve great deference. Such an inquiry will reveal that the Court has strayed markedly from the ordinary and plain meaning of the text of rule 56 (c).²⁰¹

Webster's *Ninth New Collegiate Dictionary* defines "genuine" as "actually produced by or proceeding from the alleged source or author" and "sincerely and honestly felt or experienced" and "actual, true."²⁰² Although these descriptions do not provide an iron-clad definition of the word genuine, none of them suggests that genuine means "convincing to a judge hearing a pretrial motion," the definition of the term essentially adopted by the Supreme Court in *Matsushita* and *Liberty Lobby*.²⁰³

The Court's lexicon also differs from Webster's concerning the meaning of "dispute," which according to Webster's is a "verbal controversy" or a "quarrel."²⁰⁴ In ordinary parlance, then, a genuine dispute of material fact is an actual quarrel over an important fact, a definition quite distinct from that implicitly applied by the Supreme Court in its trio of cases. Instead, the Court suggested that genuine meant "sufficiently probative to defeat a directed verdict motion."²⁰⁵ Applied to interpretations of agreed upon circumstantial facts, the Court's definition of "genuine" appears to be something like "sufficiently plausible to the Court."

"Genuine," as applied to written instruments, means that "they [the instruments] are truly what they purport to be, and that they are not false, forged, fictitious, simulate, spurious, or counterfeit."²⁰⁶ Obviously, a proffered fact can be unconvincing to a judge or jury without being false or forged, again suggesting that the Court's interpretation of rule 56(c) does not square with common understandings of the words used in the rule. If the Court interprets "genuine" to mean "true" in the ultimate or

199. See, e.g., *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98 (4th Cir. 1987); *Joiner v. City of Ridgeland*, 669 F. Supp. 1362 (S.D. Miss. 1987) (both citing Supreme Court trilogy). Courts often discuss this in terms of whether the factual conflict between movant and nonmovant poses a "trialable" issue as opposed to a dispute that, although clearly existent, admits of only one resolution. See, e.g., *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969). In bench cases, some courts have applied this approach to permit a grant of summary judgment where "trial would not enhance [the court's] ability to draw inferences and conclusions." *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123 (5th Cir. 1978). This approach is generally endorsed by Advisory Committee Member U.S. District Judge William Schwarzer in his proposed rewriting of Federal Rule 56. See Schwarzer, *Summary Judgment: A Proposed Revision of Rule 56*, 110 F.R.D. 213, 226-28 (1986). See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1139-44 (E.D. Pa. 1981). This Article questions the wisdom of the approach and suggests that further proceedings will significantly illuminate a legitimate factual dispute in all but a few cases. See *infra* text accompanying notes 409-50.

200. See *supra* note 194.

201. See *supra* note 193.

202. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 512 (1983) [hereinafter WEBSTER'S].

203. See *supra* text accompanying notes 80-121.

204. WEBSTER'S, *supra* note 202, at 733.

205. See *supra* text accompanying notes 80-121.

206. WEBSTER'S, *supra* note 202, at 366.

final sense, the Court must then envision courts as weighing and evaluating competing facts to decide a summary judgment motion. Similarly, *Black's Law Dictionary* defines a material fact as one which "is essential to the case, defense, application, etc."²⁰⁷ and defines dispute as "a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other."²⁰⁸ Again, the Court cannot be said to have derived its view of a genuine dispute of material fact from the dictionary.

As to rule 56(e)'s language that avoiding summary judgment requires a showing of a "genuine issue for trial," this language does not compel or even support the view that the summary judgment standard mirrors the directed verdict standard or that judges are permitted to treat a movant's facts as more persuasive than a nonmovant's when facts conflict. As with the plain text of rule 56(c), the "genuine issue" in rule 56(e) is an actual dispute. "For trial" means only that if there is a conflict over fact existence or fact interpretation, the motion must be denied, and that the case must proceed toward trial. Neither rule 56(e) nor the Advisory Committee Notes mention the directed verdict motion, which cannot occur until at least the middle of trial and usually is not likely to be granted until the end of presentation of the evidence. To suggest that a "triable" issue is not merely one requiring trial to begin but also one a judge expects to survive directed verdict motions at two junctures during trial strains too much the meaning of the text.

Of course, the Court did not claim to be blending dictionary terms; it suggested it was deriving the meaning of the words of rule 56(c) from case precedent and doctrinal thought and development. As discussed in subsection II(C),²⁰⁹ the Court's approach in this area is unsatisfying. My point in comparing the Court's lexicon with actual dictionaries is not to oversimplify the legal process but rather to underscore how far interpretation of rule 56(c) by the Court, which ordinarily pays great deference to the text of a statute or rule,²¹⁰ even at the expense of the drafters' intent, has diverged from the ordinary and plain meaning, even the legalistic ordinary and plain meaning, of the key words in rule 56(c). Furthermore, because the Court's task is to faithfully apply the rule, it is legitimate to ask whether the Court is doing so when measured against the bare text of the rule or whether the Court's pronouncements have placed a "judicial gloss" on the rule that was not placed there in the rulemaking process.

2. The "Legislative Intent" Behind Rule 56

When the text to be interpreted lacks sufficiently plain meaning to end the interpretative inquiry, commentators generally agree that the next area of explanation should be the legislative history of the rule or statute.²¹¹ Unfortunately, the original Advisory Committee that drafted the Federal Rules provided little official guidance

207. BLACK'S LAW DICTIONARY 618 (5th ed. 1979).

208. *Id.* at 881.

209. See *infra* text accompanying notes 272-328.

210. See *supra* note 193. See also *Schiavone v. Fortune*, 477 U.S. 21 (1986) (giving strict construction to the text of rule 15(c)); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1514-21 (1987).

211. See *supra* note 193.

in this area. The Committee Notes for the most part merely restate the language of rule 56(c) and point to the motion's use in England, New York, and Michigan. The reader who remains interested is told: "For the history and nature of the summary judgment procedure and citations to state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L.J. 423."²¹² The Court in adopting the Federal Rules did not elaborate on the Committee comments.²¹³ Clark and Samenow's article in essence stands as the expanded Committee comment on the intent behind the original Rules.²¹⁴

When the official voice of those writing the rule—the Advisory Committee Notes—is not authoritative, it is apt to examine the statements of members of the committee or other body authoring the rule or statute.²¹⁵ This approach requires greater care, however, in that individual members may attempt to partially rewrite the collective product or otherwise pursue their own agendas through separate statements or writings.²¹⁶ With some caution, then, an examination of the writings of the

212. Federal Rules of Civil Procedure Advisory Committee Notes, *reprinted in* 12 WRIGHT & MILLER, *supra* note 15, app. C at 498.

213. Rules of Civil Procedure for the Dist. Courts of the United States, 308 U.S. 645 (1938).

214. The most important amendment to the Rules in this area was the 1963 amendment to rule 56(c), which resulted in the current language requiring a nonmovant to introduce by affidavit or facts otherwise admissible in evidence and not to rest only on averments in the pleadings in order to successfully oppose summary judgment. The Advisory Committee Notes stated that this requirement was textually added "to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device" by denying summary judgment on the basis of well-pleaded allegations alone. Report of Proposed Amendments to certain Rules of Civil Procedure for United States Dist. Courts, 31 F.R.D. 621, 648 (1963). The Advisory Committee specifically noted, however, that "the amendment [is not] designed to affect the ordinary standards applicable to the summary judgment motion." *Id.* at 648. The Supreme Court adopted the 1963 amendments without further elaboration concerning the meaning of the changes in text. Amendments to the Rules of Civil Procedure for the United States Dist. Courts, 374 U.S. 861 (1963).

215. See C. NUTTING, S. ELLIOTT & R. DICKERSON, *LEGISLATION: CASES AND MATERIALS* 413–15 (4th ed. 1969) (floor speeches, debates and, more problematically, post-passage views of statutedrafter may be considered in interpreting statute); H. READ, J. MACDONALD & J. FORDHAM, *LEGISLATION: CASES AND OTHER MATERIALS* 976–77, 996–99 (2d ed. 1959); de Sloovere, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527, 552–55 (1940); Nutting, *The Relevance of Legislative Intention Established by Extrinsic Evidence*, 20 B.U.L. REV. 601, 602 (1940).

Although floor debates, speeches, and testimony are accepted parts of a statute's legislative history, they are generally accorded less interpretative weight than committee reports. There is some dispute over the propriety of attaching special significance to the views of the statute's author since others supporting the legislation may have held different views. Some authorities caution against it unless the drafter's views were made clear to the legislature at the time of passage, preferably through official channels such as hearing testimony or recorded floor proceedings. See A. SUTHERLAND, *STATUTORY CONSTRUCTION* §§ 48.10, 48.12, at 318–19, 327 (2d ed. 1948). Clark's views in the Clark and Samenow article, available to the Federal Rules Advisory Committee, the Court, and Congress, as well as incorporated into the official Advisory Committee Note are, although not a perfect analogy, suggestive of hearing testimony or floor explanations by the chief author of congressional legislation.

216. See Smith, *supra* note 7, at 914 n.1. See also Resnick, *supra* note 5, at 498–500 (1986) (rejecting notion of an Advisory Committee consensus or "collective intent" regarding interpretation of the Federal Rules but finding that the Rules as a whole have a pro-claimant orientation).

The transcripts of the Advisory Committee meetings, although not conclusive, suggest that the Committee took a view of rule 56 quite different than that taken by the Court in *Liberty Lobby* and *Matsushita*. Some members of the Committee initially suggested summary judgment language that would have used the "substantial evidence" standard of directed verdict precedent. Other members opposed this, noting possible problems with undermining the role of the jury. The Reporter was asked to draft language resolving this problem, suggesting at a minimum that current rule 56 is not a mirror image of the directed verdict. The Committee meeting comments as a whole suggest that a majority of the group thought summary judgment inappropriate whenever the respondent had introduced any honest evidence in opposition to the motion. See Transcripts of Advisory Committee Meetings of February 1, 1936, at 25–26; Transcripts of Advisory Committee Meetings of February 22, 1935, at 808–21; Transcripts of Advisory Committee Meetings of November 18, 1935, at 1572–639, Charles E. Clark Papers, boxes 97, 96, and 95 (respectively) (on file at the Yale University Sterling Library Archives and Special Collection room).

Advisory Committee members is in order, particularly those of Committee Reporter Charles C. Clark, then Dean of Yale Law School and later a Second Circuit judge. Clark is generally viewed as the prime author of the Federal Rules.

Clark's writings are not crystal clear on the "real" meaning of rule 56. On balance, however, his statements, particularly those contemporaneous with the propounding of the Federal Rules, suggest that both the original Advisory Committee and the Court that accepted the Committee's proposed rule 56 held a distinctly different view of summary judgment than did the 1986 Supreme Court. The many other works of the Advisory Committee members are unhelpful in that they do not speak directly to the issue.

a. *The Summary Judgment Articles*

Dean Clark's most thorough discussion of the summary judgment mechanism came in two articles aptly titled *The Summary Judgment*. One was written with a co-author and preceded the 1938 Federal Rules by nearly a decade,²¹⁷ the other was published fifteen years after the adoption of the Rules.²¹⁸ Taken together, these pieces suggest that Clark viewed rule 56 summary judgment as a device for adjudicating cases without trial when the material facts were not contested by either party to the dispute.²¹⁹ Clark seems to view the typical record upon which summary judgment may be granted as the virtual equivalent of stipulation by the parties as to the facts.²²⁰ The language and tone of his public writings do *not* suggest that he considered a fact's existence or interpretation in dispute only when a judge was unsure which side's assertions were more worthy of belief.²²¹

217. Clark & Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929) [hereinafter Clark & Samenow].

218. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567 (1952) [hereinafter Clark].

219. See Clark & Samenow, *supra* note 217, at 423.

220. See *id.*

221. See Clark & Samenow, *supra* note 217; Clark, *supra* note 218. This Article takes the view that this interpretation of Judge Clark's views on summary judgment is more consistent with other views he expressed regarding the spirit and thrust of the Federal Rules, particularly those concerning notice pleading. See, e.g., CLARK, CODE PLEADING (2d ed. 1947). This Article subscribes to the view that Judge Clark, as at least a fellow traveller of the legal realism scholars dominating his Yale Law School faculty (see Clark, *The Function of Law in a Domestic Society*, 9 U. CHI. L. REV. 393, 394-95 (1942)), was willing to apportion a substantial role for the lay jury in deciding cases, even with occasional error, rather than prevent the occurrence of trial and jury decision through stringent technical requirements in the rules. See e.g., *Plausible Pleadings*, *supra* note 1, at 644-51 (author critical of amended rule 11 as running counter to notice pleading theory of the Federal Rules and legal realist spirit that informed the rules in general). But see Subrin, *How Equity Conquered Common Law: The Federal Rules of Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter Subrin]. Professor Subrin argues that the 1938 Rules' adoption of many procedures of the equity courts was also part of an effort to increase the power of the trial judge at the expense of the jury, a view this Article considers overstated, at least as applied to the Drafters' willingness to constrict the role of the jury in adjudicating cases.

Although there is no disagreement that Clark was a legal realist and little disagreement that the legal realists in general preferred less formal pleading requirements, less is certain about the view held by Clark and the realists regarding the degree to which summary judgment grants might permissibly adjudicate cases that would receive jury consideration if the motion was denied. Subrin and others have observed that Clark was not particularly impressed with jury determinations, regarding them as needlessly time consuming and costly. See KALMAN, *supra* note 94, at 21 ("Clark seems to have preferred equity to law simply because of the opportunity it offered to avoid jury trial."). Kalman's only citation to support this assertion, one quite a bit broader than Professor Subrin's, is a textual note explaining that the seventh amendment required jury trial to be preserved in actions at law. Clark's view of jury trials as slower and more expensive than bench trials is quite well-documented. See, e.g., Clark, *Comment*, 32 YALE L.J. 711 (1923); Clark & Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 YALE L.J. 882 (1934). Because of Clark's apparent confidence in the wisdom of judges and his efficiency concerns, writers such as Kalman suggest that he was willing to

The 1929 article by Clark and Samenow is perhaps *the* authoritative Committee interpretation as to the intent behind rule 56. While Clark's other writings should not be completely disregarded, the Clark and Samenow article is most probative because it was officially incorporated into the Advisory Committee Notes and because it preceded the issuance of the rule, suggesting that it represents Clark's views during the drafting and adoption of the rule. To the extent that Clark's later scholarly or judicial writings conflict with the thrust of the Clark and Samenow article, the Clark and Samenow article should be viewed as the "true" quasi-legislative document. Clark's later writings could well have been influenced by later developments that did not affect the Committee, Court, and Congress in promulgating the rule. Personal differences between Clark and other judges may also have influenced Clark's later writings.²²²

Clark's articles, particularly the one co-authored with Samenow, praise the English practice of permitting summary judgment and implicitly suggest that American practice would do well to follow the English model.²²³ It does not seem farfetched to conclude that Clark and consequently the Advisory Committee had in mind something close to the English model when rule 56 was drafted. An examination of Clark's description of English practice and cases cited in his writings thus sheds some light on the Advisory Committee's probable "original intent" in drafting rule 56.

According to Clark, England officially adopted summary judgment in 1855.²²⁴ The 1855 Act was designed to make it easier for creditors to collect on business and consumer accounts by permitting entry of judgment in the creditor's favor when the plaintiff creditor could demonstrate no dispute as to the agreement to provide goods or services, provision of the services, and nonpayment.²²⁵ In 1873, a successor rule was adopted, specifically providing for special endorsement of the plaintiff's claim

employ summary judgment to abrogate jury trials. Kalman cites Clark's summary judgment articles as support for this proposition. *See* KALMAN, *supra* note 94, at 21, 244 n.91. As the discussion in this Article demonstrates, a fair reading of these articles supports no such conclusion.

Another argument suggesting a tough summary judgment standard and elimination of a substantial number of jury trials can perhaps be made by examining the transcripts of the meetings of the first Advisory Committee. The members' debate, often more of a loose discussion, occasionally makes disparaging references to the wisdom of laymen and juries. However, there appears to be nothing in these transcripts, on file at Yale's Sterling Library, *see supra* note 216, which suggests that the Committee intended to address the perceived shortcomings of lay participation by permitting judges to adjudicate competing facts and inferences in the context of summary judgment motions. Rather, the Committee, although perhaps questioning the wisdom of the seventh amendment, appears to have accepted it as a given and a roadblock to any such "strong" summary judgment or directed verdict rule. A fairer reading of the Committee transcripts is not inconsistent with this Article's thesis that the drafters intended rule 56 to decide claims with no factual dispute rather than to resolve fact disputes.

222. *See* Smith, *supra* note 7, at 954 (Clark's dislike for Second Circuit Judge Jerome Frank may have fueled Clark to favor a stronger interpretation of rule 56 than that favored by Frank).

223. *See* Clark & Samenow, *supra* note 217, at 424-35.

224. *Id.* at 424.

225. *Id.* at 424-26.

in the summons and complaint.²²⁶ This variant of the modern verified complaint shifted the production burden, requiring the debtor defendant to submit affidavits contravening these facts as a prerequisite to further defense on the merits.²²⁷ The English court then examined the plaintiff's documents and verified assertions in juxtaposition with the defendant's affidavits to determine whether there was a valid defense to the claim and whether facts were in conflict.²²⁸

Although portions of Clark's descriptions can be viewed as suggesting a more active role for the judge,²²⁹ they do not ultimately describe judicial conduct any different from that prevailing during the 1938-1986 United States federal court application of rule 56.²³⁰ In addition, examining the cases cited by Clark on English practice shows that they describe situations in which a court refrains from granting summary judgment whenever the nonmovant has introduced contrary facts, particularly when the nonmovant has put forth additional facts that would deny recovery to plaintiff (*e.g.*, when a debtor claims the failure of a product purchased from a creditor

226. *Id.* at 424.

227. *Id.* at 430-31.

228. The 1873 Act also increased the number of actions in which summary judgment was available. It allowed summary judgment in any "actions for recovery of debts or liquidated demands in money" or in "actions between landlord and tenant for the recovery of land." *Id.* at 425. The 1855 Act had permitted summary judgment only in debt collection actions. The limited number of actions in which summary judgment was available, even under the 1873 Act, suggests that the British model, of which Clark urged American emulation, required a judge only to ascertain the existence of conflicting facts and gave a court no pretrial authority to assess the comparative likelihood of either side's proffered facts or theory of the case. The actions in which summary judgment was permitted are actions in which the "paper trail" of the litigants' dispute often leaves no disagreement as to the basic facts.

For example, the 1873 Act only permitted summary judgment in nondebtor actions for a money judgment when the demand was "liquidated." *Id.* Debt collection actions usually have a contract, billings, correspondence, checks, receipts, and other tangible memorials of the facts. Landlord-tenant actions also usually have contracts, leases, payment records, and correspondence. The nature of the litigation is especially suited to a high proportion of agreed-upon facts. One may ask why, if the British wanted judges to evaluate facts in a summary judgment context, they limited the cases in which the motion could be used. The answer seems more than rhetorical: it is most likely that the English motion for summary judgment, upon which rule 56 was modeled, was considerably less aggressive than that endorsed by the Supreme Court in *Liberty Lobby* and thus was restricted to classes of cases that frequently involved no need to weigh and evaluate differing facts or theories of causation.

229. For example, in part of his discussion of the English practice, Clark approvingly quotes a procedural rule stating that a judge ruling on a summary judgment motion must see that the defendant

by affidavit, by his own *viva voce* evidence, or otherwise, shall satisfy him [the judge] that he [the defendant] has a good defense to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly.

Id. at 430 (citing Order XIV, Rule 1(a) (in the same form as in the Revision of 1893); ANNUAL PRACTICE 156 (1928); 1 YEARLY PRACTICE 141 (1928)). The English practice to which Clark and Samenow refer dealt almost exclusively with cases that plaintiffs could prove by a reference to unquestioned, conclusive, irrefutable documents, since the procedure was limited to actions involving bills of exchange, promissory note, and checks. Since the parole evidence rule and the judicial orientation of the time made it virtually impossible to modify or refute such documents with oral evidence or other circumstantial evidence, there was ordinarily no fact conflict at all in the English cases. See Bauman, *A Rationale for Summary Judgment*, 33 *IND. L.J.* 467, 473 (1958). To the extent that the English courts did weigh and decide issues of credibility and probative value of the facts, this occurred because of the unusual deference given these documents, some of which were in effect pre-dispute stipulations by the parties similar to today's confessions of judgment. *Id.* at 474. However, even under these circumstances, it appears that a debtor defendant could avoid summary judgment if it produced "some affirmative evidence" in contradiction of the document. *Id.*

230. Reading the Clark and Samenow article as a whole and reading the cases cited, it becomes apparent that the English judges satisfied themselves that the defendant had a good defense whenever the defendant offered nonfrivolous admissible evidence in contradiction of either the creditor's facts (*e.g.*, whether payment was made) or legal theory of liability (*e.g.*, whether defendant's nonpayment was justified by fraud, inferior quality of goods, etc.).

for which the debtor has admittedly withheld payment from the creditor).²³¹ According to Clark, summary judgment was denied in England "where the defendant shows a defense entitling him to trial. Such a situation arises when a conflict in the affidavits raises an issue of fact or difficult questions of law, or where the defendant brings the case within the prohibitions of a salutary law."²³²

The Clark and Samenow article also discusses summary judgment practice in various states and continues to suggest that summary judgment cannot be granted in cases in which the facts conflict, even when the movant appears to have the better of the argument. His description of New York procedure most clearly captures this as he concludes that "[i]ssue-finding, rather than issue-determination, is then the key to the [New York summary judgment] procedure."²³³ Furthermore, "situations of doubt" were to be "resolved in defendant's [nonmovant's] favor."²³⁴

The New York cases cited by Clark and Samenow echo the approach of the English courts, often citing British precedents.²³⁵ However, the New York cases are, if anything, more solicitous of nonmovants than the English cases because of the influence of the seventh amendment and a similar state constitutional provision.²³⁶ In general, the New York cases cited in the article consistently refuse summary judgment whenever the nonmovant has submitted a nonconclusory affidavit establishing any facts to support its case, even if the facts appear unlikely to persuade the trier of fact.²³⁷

231. See Clark & Samenow, *supra* note 217, at 431-34 nn.73, 74. See also *Jones v. Stone*, 70 L.T.R. 174 (1894); *Saw v. Hakim*, 5 T.L.R. 72 (1888). An examination of the English cases cited by Clark and Samenow shows the praised English practice to closely resemble the American application of rule 56 prior to *Matsushita* and *Liberty Lobby* on the sometimes vexing question of when a genuine factual dispute is presented. In general, the English cases denied summary judgment when the nonmovant put forward *any* evidence to support a defense or to contradict an element of the movant's claim. See, e.g., *Codd v. Delap*, 92 L.T.R. 510 (1905) ("There is an affidavit by the person sued that he has a good defence. I am not satisfied that he has not a good defence. I do not say that he has. I know nothing more about it than this: that in the state of conflict which there is between the parties, with the allegation that the judgments relied upon have been obtained by fraud, there is a question to be tried . . .") (by Chancellor Halsbury, reversing lower court grant of summary judgment); *Jacobs v. Booth's Distillery Co.*, 85 L.T.R. 262 (1901) (summary judgment reversed when nonmovant defendant affidavit claims misrepresentation of liability consequences of note admittedly signed by nonmovant); *Jones v. Stone*, 70 L.T.R. 174 (1894) (question of existence of triable issue or dispute of fact is to be determined "on the face of the affidavits"); *Accord Daubuz and Another v. Lavington*, 13 Q.B.D. 347 (1884) (summary judgment appropriate when nonmovant puts forth *no* defense on the merits); *Thompson v. Marshall*, 41 L.T.R. 720 (1879) (summary judgment rule intended to be applied to "clearly undefended causes"); *Groom v. Rathbone*, 41 L.T.R. 591 (1879).

The Canadian cases cited by Clark and Samenow take the same approach. See, e.g., *Davey v. Sadler*, 1 O.L.R. 626, 627 (1901) (nonmovant "may not be able to support and establish his defence at the trial, but, in my judgment, he has disclosed facts [on the face of his affidavit] sufficient to entitle him to defend the action"). *Accord F.J. Castle Co. v. Kouri*, 18 O.L.R. 462 (1909); *Canadian Gen. Elec. Co. v. Tagona Water & Light Co.*, 6 O.L.R. 641 (1903).

232. Clark & Samenow, *supra* note 217, at 433-34.

233. *Id.* at 449.

234. *Id.* at 450.

235. See, e.g., *Dwan v. Massarene*, 199 A.D. 872, 192 N.Y.S. 577 (1922) (citing *Jacobs v. Booth's Distillery Co.*); *Peninsular Transp. Co. v. Greater Britain Ins. Corp.*, 200 A.D. 695, 193 N.Y.S. 886 (1922) (citing *Jacobs v. Booth's Distillery Co.*, *Jones v. Stone*, and *Codd v. Delap*).

236. See N.Y. CONST. art. I, § 2.

237. See *Dwan v. Massarene*, 199 A.D. 872, 192 N.Y.S. 577 (1922); *Peninsular Transp. Co. v. Greater Britain Ins. Corp.*, 200 A.D. 695, 193 N.Y.S. 886 (1922) (court may not try issues of fact posed by affidavits but is limited to ascertaining if affidavits place facts or interpretations of conduct at issue; court may not enter summary judgment even when nonmovant's claims appear unlikely to be proven at trial). *Accord Hanna v. Mitchell*, 202 A.D. 504, 196 N.Y.S. 43 (1922), *aff'd*, 235 N.Y. 534, 139 N.E. 724 (1923); *Ritz Carlton Restaurant & Hotel Co. v. Ditmars*, 203 A.D. 748, 197 N.Y.S. 405 (1922).

Clark suggests the same view in his discussions of summary judgment in New Jersey,²³⁸ the District of Columbia,²³⁹ Delaware,²⁴⁰ and Indiana.²⁴¹ He also noted that in most states summary judgment was only available in limited actions, usually those sounding in contract, and particularly debt collection, and that this was the trend in its perceived expanding use in more states.²⁴²

The Advisory Committee Notes cite England and New York as examples of the summary judgment practice envisioned by the drafters of rule 56.²⁴³ Coupled with the absence of any more definitive statements in the Notes contrary to any statements in the Clark and Samenow article, the inevitable conclusion is that the Advisory Committee's understanding of rule 56 was that of the Clark and Samenow article. At least at the time the Federal Rules were promulgated, Clark and the Committee placed greater limits on granting summary judgment than did the Supreme Court in 1986.

Interestingly, the references in the English and pre-Federal Rules American cases as well as the Clark and Samenow commentary speak of a nonmovant avoiding summary judgment by demonstrating that it has shown a "need for trial." The Supreme Court in *Liberty Lobby* interpreted this phrase to mean a "need to submit the case to the jury or other factfinder after the close of the evidence."²⁴⁴ This view stretches the meaning of the word "trial" and the apparent intent of the pre-Rules history of summary judgment too much.

A trial is simply the initiation of courtroom proceedings: motions *in limine*, jury selection, opening statements, and so on. A litigant can receive a trial without having jury deliberations punctuate the proceeding. Federal rules 41 and 50 specifically envision that a substantial number of litigants will have cases that merit the beginning of a trial but not its completion by jury verdict or written findings of fact and conclusions of law by the trial judge.²⁴⁵ Consequently, the better view is that the

238. Clark & Samenow, *supra* note 217, at 442-44 (court has power to overlook sham or frivolous defenses and to search for "bona fide" fact disputes—the presence of facts sufficient to defend; New Jersey courts find such facts on the basis of affidavit showing factual conflict, even when nonmovant's facts not persuasive to the court).

239. *Id.* at 457 n.235 (quoting *National Metro. Bank v. Hitz*, 11 App. D.C. 198, 199 (1879)) (summary judgment intended to eliminate need to try case when debtor defendants are merely interposing "formal denials of pleading" that Court implied could not be set forth in good faith sworn affidavit). *See also* Clark & Samenow, *supra* note 217, at 459 (citing *Gleason v. Hoeke*, 5 App. D.C. 1, 7 (1894), for the proposition that "[t]he fact that the defense appears unreasonable cannot affect the defendant's right to trial.").

240. Clark & Samenow, *supra* note 217, at 461 & n.272 ("The defendant's affidavits are usually considered true.").

241. *Id.* at 463 (citing *Holland v. Fletcher*, 62 Ind. App. 149, 112 N.E. 847 (1916) (summary judgment denied when record, and in one case interrogatory answers, failed to "unequivocally show that the [defendant's] pleading was false").

242. Clark & Samenow, *supra* note 217, at 470 (at time of the Clark and Samenow article, only Indiana and Virginia made summary judgment available in all civil actions).

243. The Committee's original Advisory Note on the Rules stated that summary judgment "has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it." *See* Federal Rules of Civil Procedure Advisory Committee Notes, *reprinted* in 12 WRIGHT & MILLER, *supra* note 15, app. C at 498.

244. *See supra* text accompanying notes 99-121.

245. Rule 41 provides that the court may order a matter involuntarily dismissed in a bench trial or that plaintiff and defendant may stipulate to involuntary dismissal at any stage of the proceedings. Rule 50(a) provides that the court may direct a verdict for any party at the close of plaintiff's case-in-chief or at the close of the evidence before the case is submitted to the jury. Rule 52 provides that a judge acting as the trier of fact shall in making her decision set forth written or transcribed findings of fact and conclusions of law or an equivalent memorandum explaining that decision.

litigant opposing summary judgment need only demonstrate a sufficient fact dispute to warrant the beginning of trial and need not prove to the court in advance of trial that it would survive a directed verdict motion. To some extent, the purpose of the directed verdict motion is to permit the judge to decide on the basis of the evidence as it develops at trial whether a case is too weak to send to the jury.

Clark's 1952 article is less revealing in that it devotes much of its time to summarizing relatively uncontroversial aspects of rule 56 and discussing the role of summary judgment without directly addressing the thornier question of judicial fact evaluation. Nothing in the article is inconsistent with the Clark and Samenow piece written more than twenty years earlier, which is cited approvingly.²⁴⁶ Clark again approvingly cites New York, New Jersey, and Michigan cases as he did in the Clark and Samenow article.²⁴⁷

According to Clark's 1952 article, summary judgment may be granted when "no defense is shown or when the defense appears to be sham or frivolous."²⁴⁸ Rather than permitting a judicial evaluation of the probative worth of facts and requested inferences, Clark views summary judgment as relying upon uncontested facts and gaining its ability to efficiently terminate litigation before trial by going beyond the pleadings and requiring the nonmovant to submit affidavits rather than merely rest upon averments. Clark anticipates the 1963 amendment to rule 56(e) in that his view of a "strong" summary judgment rule is one that requires the nonmovant to introduce evidence in opposition to the motion—not highly probative evidence, not evidence more persuasive than that of the movant, but merely some evidence that creates a factual dispute.²⁴⁹

b. Judge Clark's Second Circuit Opinions

At the close of the 1952 article, Clark criticizes the notable Second Circuit opinion from which he dissented, *Arnstein v. Porter*.²⁵⁰ He attacks the "slightest doubt" test allegedly created by his circuit court rival, Judge Jerome Frank.²⁵¹ Although some may regard this as Clark's endorsement of a stronger rule 56, his views in *Arnstein* and other Second Circuit cases do not place him in harmony with the *Matsushita* and *Liberty Lobby* majorities.²⁵² To Clark, summary judgment is designed to eliminate cases in which the claimant has "no case at all,"²⁵³ not to dismiss claims in which the claimant's case appears weak in the eyes of the judge. Although Clark finds the relationship between summary judgment and directed

246. Clark, *supra* note 218, at 567 nn.2, 3.

247. *Id.* at 567, 569. The Michigan case law concerning the judge's role in summary judgment was not well developed but suggested that the court must deny the motion so long as the movant's affidavits aver conflicting facts rather than mere allegations. See *Warren Webster & Co. v. Pelavin*, 241 Mich. 19, 216 N.W. 430 (1927).

248. Clark, *supra* note 218, at 568. This phrase appears often in the New York and English cases cited by Clark and Samenow.

249. *Id.* at 566, 571.

250. 154 F.2d 464 (2d Cir. 1946).

251. Clark, *supra* note 218, at 576, 578.

252. See Schick, *Judicial Relations on the Second Circuit 1941-51*, 44 N.Y.U. L. REV. 939, 941-47 (1969) [hereinafter Schick]; Smith, *supra* note 7, at 930, 952.

253. Clark, *supra* note 218, at 578.

verdict to be "a suggestive and at times fruitful analogy,"²⁵⁴ he views it only as an analogy and "not a rule of thumb."²⁵⁵

In *Arnstein*, composer Ira Arnstein sued well-known composer Cole Porter, contending that Porter had copied portions of *Begin the Beguine* and *Night and Day* from works by Arnstein's.²⁵⁶ At his deposition, Porter denied copying. Arnstein's deposition suggested he was somewhat disturbed and given to flights of fantasy concerning his compositions and attempts to steal them. He had an extensive past history of multiple copyright infringement suits against other composers.²⁵⁷ Judge Frank, writing for the majority, found Arnstein's theory of the case highly improbable but held this insufficient to support a grant of summary judgment, ruling in essence that the nub of the case was a credibility contest between Arnstein and Porter that must be decided by a jury.²⁵⁸ In language that became a red flag for the decision's critics, Frank wrote that summary judgment must be denied when there is the "slightest doubt as to the facts."²⁵⁹

Clark subsequently ridiculed Frank's "slightest doubt" language.²⁶⁰ Over the years, these two giants of American jurisprudence continued the battle on a professional and personal level²⁶¹ as to the appropriate approach to summary judgment. In time, the commentators embraced Clark's perspective rather than Frank's, criticizing the so-called "slightest doubt" test and advocating a more aggressive approach to summary judgment.²⁶²

254. *Id.* at 579.

255. *Id.*

256. *Arnstein v. Porter*, 154 F.2d 464, 474 (2d Cir. 1946); Smith, *supra* note 7, at 930.

257. *Arnstein v. Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946).

258. *Id.* at 470.

259. *Id.* at 468 (citing *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130 (2d Cir. 1945), a case in which Frank's view of the merits prevailed over Clark's dissent in reversing a grant of summary judgment). In *Arnstein*, Judge Frank's precedent cited in support of the "slightest doubt" language—*Sartor v. Arkansas Natural Gas. Corp.*, 321 U.S. 620 (1943)—illustrates the confused nature of summary judgment law and the tendency for the same cases and language to be interpreted differently according to the eyes of the beholders. In *Arnstein*, Judge Frank cited *Sartor* for the proposition that summary judgment could be granted upon only the clearest and most compelling record. Forty years later in *Liberty Lobby*, Justice White cited *Sartor* for the proposition that the summary judgment standard was identical to a directed verdict standard that permitted judges to assess the worth of each side's evidence and grant summary judgment in a larger number of cases. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2512 (1986).

260. See, e.g., Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 504 (1950) ("[A] slight doubt can be developed as to practically all things human.").

261. See Smith, *supra* note 7, at 954 (although Clark "heartily endorsed Judge Frank's appointment to the Second Circuit, he gradually came, I believe, to dislike Frank"). Professor Smith suggests that to some extent the personal animosity between Clark and Frank fueled their doctrinal disagreement rather than vice versa. *Id.*

262. See, e.g., HERR, *supra* note 18, § 16.5, at 355; WRIGHT, MILLER & KANE, *supra* note 17, § 2727, at 174-78.

A re-examination of *Arnstein* suggests that Judge Frank, whose overblown dicta in denying summary judgment was indeed unfortunate, was to some extent unfairly maligned by the critics and that Judge Clark's dissent in *Arnstein* was premised on something quite different than endorsement of any fact weighing by judges deciding summary judgment. Judge Frank noted that Arnstein's composition had sold more than a million copies, making Porter's access to the works undisputed. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). In order to prevail upon a claim of copyright infringement, the plaintiff must prove (1) access by the defendant to the protected work; and (2) substantial similarity between the works. See *id.* at 468-70. As to whether Porter could have copied Arnstein, Frank noted that the record did show series of identical notes in each composition and that given the diametrically opposed testimony of the parties, credibility, a matter traditionally for jury determination, was at issue in the case. *Id.* at 470.

On this basis, Judge Frank, joined by Learned Hand, hardly a judge lacking in intellectual capacity or intestinal fortitude, found summary judgment precluded. Frank in fact referred to the directed verdict in his analysis and concluded that a directed verdict could not be granted on the same record at the close of trial. *Id.* Judge Frank went out of his way

Judge Clark's dissent is generally discussed as though it contested with the majority only upon the issue of whether a credibility contest between witnesses precluded summary judgment.²⁶³ From such discussions, one may erroneously derive the impression that Clark advocated judicial authority to resolve credibility determinations in ruling on summary judgment motions. In actuality, Clark's dissent focused on expert opinion stating that many compositions would have in common a short string or strings of identical notes but that such similarity was coincidental and did not in the expert's opinion constitute plagiarism.²⁶⁴ The majority deemed this expert opinion, which had been obtained by Clark *ex parte* but not submitted by the parties, "utterly immaterial," a characterization with which Clark took strong issue.²⁶⁵

Clark also argued that upon so little evidence of overlap in notes or uses, the court could find as a matter of law a lack of substantial similarity between the Arnstein works and the Porter works, thereby removing the case from jury consideration without the need to weigh credibility.²⁶⁶ Although Clark's view of the fact/law distinction in *Arnstein* may have shown some latent sympathy for the *Matsushita* approach of disfavoring certain theories of a case as well as some lack of enthusiasm for the jury, it also clearly shows that Clark's *Arnstein* dissent, usually seen as the high water mark of his campaign for a stronger summary judgment rule, rejected *Liberty Lobby's* suggestion of judicial assessment of the probative value of evidence.²⁶⁷

to limit the *Arnstein* holding, suggesting an example of when summary judgment would be apt to prevent a "farcical" trial. *Id.* at 470-71, 473. Judge Frank wrote:

We agree that there are cases in which a trial would be farcical. If, in a suit on a promissory note, the defendant, pleading payment, sets forth in an affidavit his cancelled check to the order of the plaintiff for the full amount due on the note and a written receipt in full signed by the plaintiff while plaintiff in a reply affidavit merely states that he did not receive payment and suggests no other proof, then to require a trial would be absurd; for cross-examination of the defendant in such circumstances clearly would be futile.

Id. at 470-71 (citation omitted).

In other words, Judges Frank and Hand, below the surface of the regrettable "slightest doubt" language, were taking, in general, a mainstream view of summary judgment. To them, a "genuine dispute" under rule 56 was one in which the nonmovant's evidence was not clearly fabricated by the nonmovant, self-contradicted, at odds with the laws of nature or other unquestionable sources, or so woefully improbable as to be a sham. For example, the *Arnstein* majority also agreed that summary judgment could be granted in a copyright infringement claim that was so improbably ridiculous as to be dismissed as a matter of law, for example, when "Ravel's 'Bolero' or Shostakovich's 'Fifth Symphony' were alleged to infringe 'When Irish Eyes Are Smiling.'" *Id.* at 473. To Frank, "[i]n such a case, the complete absence of similarity would negate both copying and improper appropriation." *Id.* at 473 n.23. At some outer boundary, then, even Judges Frank and Hand were willing to grant summary judgment in the face of an ostensible issue of fact existence or fact interpretation by resolving the issue as a matter of law. Their view of when this was appropriate, however, stopped far short of that in the *Matsushita* and *Liberty Lobby* Courts.

263. See, e.g., WRIGHT, MILLER & KANE, *supra* note 17, at § 2727; Smith, *supra* note 7, at 930.

264. *Arnstein v. Porter*, 154 F.2d 464, 476-78 (2d Cir. 1946) (Clark, J., dissenting).

265. *Id.* at 478. See also Schick, *supra* note 252, at 944.

266. *Arnstein v. Porter*, 154 F.2d 464, 480 (2d Cir. 1946) (Clark, J., dissenting).

267. Perhaps realizing that his case-specific suggestion for eliminating a claim most regarded as a waste of judicial resources might be misinterpreted, Judge Clark took pains to restate his allegiance to the seventh amendment. "I am not one to condemn jury trials, since I think it has a place among other quite finite methods of fact-finding." *Id.* at 479 (citation omitted). In addition, Clark noted that the claimant may not even have a jury trial right in light of his substantive claim. *Id.* Most commentators suggest that Clark was in general receptive to jury trials. See Smith, *supra* note 7, at 917 ("Clark would have gone further to ensure against appellate reversal, allowing the judge to order jury trial in all cases regardless of the parties' rights. . . . Clark contended that [jury trial right] ought to . . . be determined as to each claim presented rather than by characterizing the action as a whole.") (citing Clark & Moore, *A New Federal Civil Procedure II*, 44 YALE L.J. 1291, 1297-98 (1935)); *Plausible Pleadings*, *supra* note 1, at 645-47. Clark's position on the right to a jury trial in a multi-claim case in a merged system of law and equity was essentially adopted by the Supreme Court in

Clark's writings as a Second Circuit judge in favor of a stronger interpretation of rule 56 may be cited by some as evidence that the *Matsushita* and *Liberty Lobby* approaches are consistent with the letter and spirit of the 1938 Rules. While it is true that during the 1940s, Clark did dissent from several well-known Second Circuit refusals to grant summary judgment,²⁶⁸ a closer examination of these cases, however, shows that Clark's advocacy of a "strong" summary judgment was limited to arguing for an interpretation of rule 56 that has since been codified in rule 56(e), requiring the nonmovant to respond to the motion with admissible material rather than merely resting upon contrary averments of fact.²⁶⁹

Beacon Theatres v. Westover, 359 U.S. 500 (1959). But see Subrin, *supra* note 221, at 961-74 (arguing that the 1938 Federal Rules of Procedure demonstrate distinct anti-jury and pro-judge bias).

268. See Smith, *supra* note 7, at 928-31. Although Professor Smith, like most commentators, characterizes Clark as one advocating that summary judgment "be granted liberally," Smith's discussion and the cases cited therein make no mention of judicial fact assessment but primarily discuss Clark's efforts to require the nonmovant to offer "specific proofs rather than general allegations" in opposition to the motion. *Id.* at 928. The cases marshalled by Smith are the infamous *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), and other cases decided during the period, some of which are cited nearly as often, but seldom as extensively discussed, as *Arnstein*: *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469 (2d Cir. 1943); *MacDonald v. Du Maurier*, 144 F.2d 696 (2d Cir. 1944); *Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F.2d 399 (2d Cir.), *cert. denied*, 325 U.S. 861 (1945); *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130 (2d Cir. 1945); and *California Apparel Creators v. Wieder of Cal., Inc.*, 162 F.2d 893 (2d Cir.), *cert. denied*, 332 U.S. 816 (1947).

In *Engl*, Judge Clark wrote for the majority and read into the former rule 56 a requirement that the nonmovant meet the motion with specific proofs, a requirement now made explicit in rule 56(e), added in 1963. Rule 56(e) states: When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Du Maurier was a copyright infringement allegation brought against the author of a popular novel by the author of an obscure novel alleging some plot similarities between them. The majority denied summary judgment despite suggesting it unlikely that plaintiff would prevail at trial. Judge Swan, normally an ally of Clark's on summary judgment matters (see Smith, *supra* note 7, at 929), joined by Judge Learned Hand, found that a finding of plagiarism was not so unreasonable as to preclude trial. In dissent, Clark argued that the majority erred because plaintiff "chose to rest upon a purely formal allegation of copying, with no specification of actual access" (*MacDonald v. Du Maurier*, 144 F.2d 696, 702 (2d Cir. 1944) (Clark, J., dissenting)), a grave shortcoming according to Clark in light of plaintiff's burden of proof. Although Clark hints that the plaintiff's claim was perhaps sufficiently unreasonable to be rejected as a matter of law (*id.* at 703), he does not go so far as *Matsushita* in this regard and never suggests, as does *Liberty Lobby* that a judge could enter summary judgment if she finds the record one-sidedly in favor of the movant.

On its record, *Du Maurier* is a close case with persuasive arguments on both sides. Although the plaintiff had relied on allegations, it also appears that the defendant had made her motion without supporting affidavits or discovery materials. In a sense, the defendant may have been merely claiming that the plaintiff had no support for its case without pointing to specific failure of an essential element. As Justice White's concurrence in *Catrett* illustrates, such a motion may not succeed even under the post-1986 Supreme Court view favoring a strong rule 56. *Celotex v. Catrett*, 477 U.S. 317, _____, 106 S. Ct. 2548, 2555 (1986) (White, J., concurring). Clark's dissent, although well-taken, hardly seems as though he were writing "as if summary judgment itself were at stake" as stated by Professor Smith. Smith, *supra* note 7, at 929.

In *Stulman-Emrick*, Clark wrote an opinion upholding summary judgment in a contract case in which the contract contained clear written language specifying shipment terms consistent with both evidence of trade usage and common sense. *Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F.2d 399, 401-05 (2d Cir.), *cert. denied*, 325 U.S. 86 (1945). *Doehler Metal Furniture* involved somewhat less clear contract language and events, prompting the panel composed of Frank, Chase, and Learned Hand to deny summary judgment. The dicta announcing the "slightest doubt" test for granting summary judgment, rather than the holding, made *Doehler Metal Furniture* controversial to Clark. See Smith, *supra* note 7, at 930. In *California Apparel*, Clark wrote for a panel granting summary judgment because plaintiff-nonmovants had failed to "disclose in their affidavits what they do intend to rely upon [at trial]." *California Apparel Creators v. Wieder of Cal., Inc.*, 162 F.2d 893, 900 (2d Cir.), *cert. denied*, 332 U.S. 816 (1947). The affidavits even suggested obvious weaknesses in their claims. *Id.*

269. See, e.g., *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469, 473 (2d Cir. 1943) ("mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment"); *Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F.2d 399, 405 (2d Cir.), *cert. denied*, 325

Clark's criticisms of reluctance by his colleagues to grant summary judgment never suggested that judges assess the worth of either side's evidence in ruling on summary judgment motions. Rather, he viewed his brethren as occasionally too timid in finding that a nonmovant had no legally material facts in support of its case or in failing to reject a nonmovant's contention as foreclosed as a matter of law.²⁷⁰ One should also remember that the popular notion of Clark as a summary judgment "hawk" battling with summary judgment "doves" on the Second Circuit stems from only a handful of cases given notoriety because of the prestige and occasionally combative relations of that bench.²⁷¹ In sum, the writings of Dean Clark, Reporter Clark, and Judge Clark tend to support a view of summary judgment at odds with *Matsushita* and *Liberty Lobby*.

C. Prevailing Summary Judgment Practice and Scholarship Prior to Liberty Lobby

1. Prior Commentator Consensus and Precedent

Prior to the *Liberty Lobby* opinion, some scholars had endorsed much of the approach taken by the Court, particularly the use of the directed verdict standard as the summary judgment standard,²⁷² but they had written as though this were not

U.S. 861 (1945) (plaintiff-nonmovant made "no attempt, or even suggestion of an attempt, to 'condescend upon particulars'" in opposition to motion as required by rule 56); *California Apparel Creators v. Wieder of Cal., Inc.*, 162 F.2d 893, 901 (2d Cir.), *cert. denied*, 332 U.S. 816 (1947).

270. Although Clark's seeming tendency to want to reject claimants' theories of the case as a matter of law in copyright cases may seem similar to the Court's approach to the antitrust claim in *Matsushita*, Clark refrains from characterizing the claims as implausible or suggesting that different evidentiary standards apply to theories less popular to the bench. Rather, Clark's "matter of law" suggestions seem more at the core of substantive law. For example, in *Arnstein* he suggested that the court interpret copyright law to require more than a few consecutive notes of similarity to constitute infringement, presumably even if the few notes had been copied. *Arnstein v. Porter*, 154 F.2d 464, 477, 480 (2d Cir. 1946) (Clark, J., dissenting).

271. During the 1940s, the Second Circuit was clearly the preeminent federal appeals court, composed of well-known and respected judges such as Clark, Frank, Learned Hand, Augustus Hand, and former Yale Law School Dean Thomas Swan. The occasional clashes of these formidable personalities, especially the feud between Clark and Frank, has received significant scholarly comment. *See generally* M. SCHICK, *LEARNED HAND'S COURT* (1970); Schick, *supra* note 252; Smith, *supra* note 7.

272. *See* Currie, *supra* note 20; Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707 (1984) [hereinafter *Actual Malice*]; Louis, *supra* note 18; Pollak, *Liberalizing Summary Adjudication: A Proposal*, 36 HASTINGS L.J. 419 (1985) [hereinafter Pollak]; Sonenshein, *supra* note 18.

Both in its view of the authority of the judge to evaluate facts in a summary judgment motion and its holding that the "clear and convincing" evidence standard of proof applied to summary judgment as well as trial in defamation actions, the Supreme Court in *Liberty Lobby* essentially adopted the approach urged by Professor Louis in his *Yale Law Journal* and *Southern California Law Review* articles. Professor Louis suggested in the Yale article that courts ruling on summary judgment motions should take into account whether the movant bore the burden of proof and the quantum of proof required to sustain a claim. *See* Louis, *supra* note 18, at 748. Movants without the burden of proof should therefore be able to prevail when they presented virtually uncontested or substantially probative evidence negating an essential element of the nonmovant's claim. *Id.* at 748-50. A summary judgment "motion is closely analogous to the [moving] party's motion at trial for a directed verdict on the same issue." *Id.* at 748. When nonmovant does not bear the burden of persuasion, "the summary judgment evidentiary standard should be relaxed." *Id.* at 749. Focusing specifically on defamation cases in the *Southern California Law Review* article, Professor Louis argued that the nonmovant defamation claimant must have "a realistic chance to reach the jury" in opposition to a directed verdict motion if the court is to find a genuine issue as to actual malice (*see Actual Malice, supra*, at 719). In other words, under the Louis approach, as essentially accepted in *Liberty Lobby*, the defamation claimant opposing summary judgment must place in the record reasonably strong circumstantial evidence of malice that could support a reasonable factfinder's finding of malice by clear and convincing evidence. Professor Louis did not go as far as the *Liberty Lobby* Court. He counseled denial of summary judgment when the claimant can realistically show a possibility of obtaining additional evidence before trial and also

universal summary judgment practice. Regardless of one's views concerning the wisdom of merging the rule 56 and rule 50(a) standards, one is hard pressed to demonstrate that these legal scholars were simply wrong about the state of the law. They recognized that in modern federal practice, many, probably most, courts treated summary judgment as different from and harder to obtain than a directed verdict.

Against this backdrop, the Supreme Court majority indirectly told those promoting reform that the millennium had not only arrived but had been in place for nearly fifty years. To the reformist critics of pre-*Liberty Lobby* summary judgment and to lawyers generally, these pronouncements must have seemed to describe a legal world unlike the one within which they moved. To be sure, courts had taken inconsistent approaches to both summary judgment and directed verdict motions, making the commentators' assessments of the state of the law contradictory in part. Despite this, the major treatises on federal practice—Wright and Miller,²⁷³ *Moore's Federal Practice*,²⁷⁴ and Wright's *Law of Federal Courts*,²⁷⁵—as well as the most respected general treatises on civil

counseled that courts should also consider claimant's lack of access to evidence, the relative expense of claimant proof through trial subpoenas rather than depositions, and "any facts which call into question the defendant's denials or explanations of the challenged conduct." See *id.* at 720. Professor Louis also noted the importance of the trial atmosphere, cross-examination, and proper inferences suggesting disbelief of the movant's affidavit claims of no malice. See *id.* at 716-22. As detailed in this Article's critique of *Liberty Lobby*, see *supra* text accompanying notes 99-121, the Court gave rather short shrift to these factors counseling restraint in granting summary judgment and instead embraced essentially only the pro-defendant, pro-summary judgment rationale of Professor Louis's writings.

273. See WRIGHT, MILLER & KANE, *supra* note 17, at §§ 2713, 2725, 2727.

274. See MOORE, *supra* note 164, ¶¶ 56.02[10], 56.04[2]. Professor Moore equated the theoretical bases of summary judgment and directed verdict in that both provided for decision where there was no issue of fact existence or fact inference requiring jury consideration. In reading *Moore*, it seems his concept of the directed verdict did not permit the judge, even after the close of the evidence, to assess the relative probative worth of conflicting evidence. *Id.* at ¶ 56.04[02]. Rather, the required inquiry examined whether there was a fact conflict.

In deciding a summary judgment question, the judge was cautioned by Moore that "it is not the trial court's function to pass upon credibility in evaluating the evidentiary material in support of and in opposition to the motion." *Id.* at ¶ 56.02[10]. Moore also noted the obvious difference in the timing and data bases of the motions and cites with approval *Denny v. Seaboard Laquer, Inc.*, 487 F.2d 485 (4th Cir. 1973), which stated that "[e]ven in cases where the judge is of the opinion that he will have to direct a verdict . . . he should ordinarily hear the evidence and direct a verdict rather than attempt to try the case in advance on a motion for summary judgment." *Id.* at 491. Moore also cited *Ryan v. Glenn*, 336 F. Supp. 555, 558 (N.D. Miss. 1971), in which the court stated that it was "not required at [the summary judgment] juncture to determine whether defendant's evidence is sufficient to withstand a motion for a directed verdict" (emphasis the court's). Perhaps the most interesting case cited by Moore for the proposition of theoretical similarity between summary judgment and directed verdict is *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), the famous "slightest doubt" case denying summary judgment and engendering heated and continuing debate between Judges Clark and Frank. Normally, of course, *Arnstein* is not viewed as a case consistent with the *Matsushita* and *Liberty Lobby* approaches. To some extent, then, Professor Moore, like other commentators makes a comparison between rule 56 and rule 50 but on closer examination seems to suggest that courts have correctly applied them in distinct ways. Moore, like the other cases and commentators, provides only superficial support for the Supreme Court's actions in *Matsushita* and *Liberty Lobby*.

275. See WRIGHT, *supra* note 17, at 662-66. Professor Wright's description of the tasks before the court in deciding summary judgment motions demonstrates the difference between the traditional approach and that advocated by the Court in 1986. To Wright, the summary judgment motion "argues that as a matter of law upon admitted or established facts the moving party is entitled to prevail." *Id.* at 664. No mention is made in this leading treatise of a summary judgment movant prevailing because its facts are more probative or persuasive or plausible or that the evidence is "so one-sided." See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2511 (1986).

Professor Wright quotes approvingly the statement in *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940), that the purpose of a summary judgment motion "is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." According to Professor Wright, "[o]n a motion for summary judgment, the court cannot try issues of fact. It can only determine whether there are issues to be tried." WRIGHT, *supra* note 17, at 664. In addition, a "party opposing the [summary judgment] motion is to be given the benefit of all reasonable doubts in determining

procedure²⁷⁶ and lesser known commentators²⁷⁷ had all concluded that summary judgment and directed verdict were quite distinct in practice and distinct in theory as well. Not even those finding the closest nexus between summary judgment and directed verdict contended that the standards for the two rules "mirrored" one another as the *Liberty Lobby* Court held. The leading law school civil procedure texts, focusing primarily on federal procedure, also suggested both that the summary judgment and directed verdict standards were not congruent and that the directed verdict inquiry did not permit assessment of the probative value of competing facts.²⁷⁸

whether a genuine issue exists." *Id.* at 666-67 (citations omitted). He also endorses in large part the view that summary judgment is generally inappropriate in cases involving conspiracy and state of mind. *Id.* at 665-66. *Matsushita* involved an alleged conspiracy. *Liberty Lobby* turned on the state of mind of the defendants. "That it may be surmised that the non-moving party is unlikely to prevail at the trial is not sufficient to authorize summary judgment against him." *Id.* at 668 (citations omitted). A fair reading of Wright seems clearly at variance with the Court's 1986 approach to summary judgment. See also COUND, *supra* note 11, at 10 ("in ruling on a motion for summary judgment the judge does not decide which side is telling the truth. . . . [S]ummary judgment will not be appropriate even though the judge is firmly convinced that [an affiant opposing summary judgment] is lying."); JAMES & HAZARD, *supra* note 11, § 5.19 at 273 (summary judgment "not intended to resolve issues that are within the traditional province of the trier of fact, but rather to see whether there are such issues."); WRIGHT, MILLER & KANE, *supra* note 17, at § 2712 (grant of summary judgment when there are "no disputed facts" as opposed to when facts are "so one-sided" or vastly different in probative force according to court's perception).

The force of these authorities weighs particularly strongly against the outcomes in *Matsushita* and *Liberty Lobby*, especially with regard to the "traditional province of the trier of fact." According to James and Hazard, "the trier of facts may have two distinct and different functions: to find what the facts were, and to evaluate those facts in terms of legal consequences. . . . Summary judgment should be denied 'even where there is no dispute as to the evidentiary facts but only as to the conclusions to be drawn therefrom.'" JAMES & HAZARD, *supra* note 11, § 5.19, at 273 n.5 (quoting *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir. 1951)) (other citations omitted).

276. See, e.g., JAMES & HAZARD, *supra* note 11, § 5.19; J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* § 9.3, at 439-41 (1985).

277. See R. HAYDOCK, D. HERR & J. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* § 16.1.10 (1985) [hereinafter HAYDOCK]; HERR, *supra* note 18, at 52 (1987 Supp.), in which the authors endorsed the merger of summary judgment and directed verdict doctrine, viewing this as a substantial change in the status quo. The authors endorsed and cited the Sonenshein article, *supra* note 18, and stated: "Because courts generally feel themselves empowered to direct verdicts where the case for the nonmovant is weak but more than nonexistent, this would generally tend to make summary judgment somewhat more available, a trend favored by the authors." The instant author now, obviously, holds a different view. The opinions expressed herein are my own and not necessarily those of Mr. Herr or Professor Haydock.

See also Note, *Summary Judgment in the Federal Courts*, 99 U. PA. L. REV. 212, 215-16 (1958) (suggesting that the proffering of any conflicting evidence by nonmovant precluded summary judgment; "fact that the truth of [nonmovant's] affidavits is less probable, or that he has failed to introduce statements of disinterested parties, or that his evidence is equivocal does not authorize the court to grant summary judgment against him.") (citations omitted).

278. See, e.g., COUND, *supra* note 11, at 10, 772-79, 919-27. As previously noted, the Cound textbook states at its outset the traditional rule that judges may not make credibility assessments to resolve a motion for summary judgment and must deny the motion where affidavits put a fact in issue "even though the judge is firmly convinced that [the] affiant is lying." *Id.* at 10. This seems quite a different standard from that enunciated in *Liberty Lobby*, in which the judge is invited to grant summary judgment in the face of a conflicting affidavit that the judge finds to be insignificantly convincing. One summary judgment case excerpted by Cound, (*Lundeen v. Cordner*, 354 F.2d 401 (8th Cir. 1966)), makes the theoretical comparison between summary judgment and directed verdict but suggests that both motions may be granted only when there is no conflict in the material evidence (COUND, *supra* note 11, at 776). The directed verdict cases excerpted by Cound, (*Denman v. Spain*, 242 Miss. 431, 135 So.2d 195 (1961); *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957)), hold the same view of the directed verdict.

See also M. ROSENBERG, H. SMIT & H. KORN, *ELEMENTS OF CIVIL PROCEDURE* 686-707, 962-91 (4th ed. 1985) [hereinafter ROSENBERG]. Cases excerpted by Rosenberg include the well-known *Arnstein v. Porter*, with a discussion of the Second Circuit's eventual abandonment of the "slightest doubt" test in favor of the more rigorous but non-fact assessing approach of *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952). Another excerpted case, *Di Sabato v. Soffes*, 9 A.D.2d 297, 193 N.Y.S.2d 184 (1st Dept. 1959), treats summary judgment as apt only when the nonmovant completely fails to controvert evidence and suggests that a grant of the motion is inapt when the uncontradicted facts would support divergent inferences. See ROSENBERG, *supra*, at 701-05 ("In personal injury actions the issues of negligence and contributory negligence are

Generally, someone consulting these sources would have been told that summary judgment was appropriate under rule 56 when the moving party demonstrated no divergence in the parties admissible proof of important facts but that a conflict in these factual "stories" of the parties precluded summary judgment.²⁷⁹ Thus, when the defendant/movant in a claimed breach of contract for the sale of goods introduced evidence that the value of the alleged contract was more than five hundred dollars and the purported contract was not memorialized by a writing signed by the defendant, the defendant had articulated a winning summary judgment motion on statute of frauds grounds if the plaintiff stood idly by, resting on merely its averments that a contract existed.

If, however, the plaintiff/nonmovant had submitted an affidavit by the plaintiff stating that defendant had orally made the contract and that plaintiff, in reasonable reliance on the oral agreement, entered into obligations with suppliers and that defendant was aware of plaintiff's consequent exposure and contract obligations, plaintiff had stated a possible situation of detrimental reliance that could vitiate the statute of frauds defense. There existed a fact conflict as to whether the statute of frauds defense could be applied. No matter how many affidavits submitted by defendant disavowing conduct giving rise to reliance, no matter how skeptical the judge about plaintiff's claim, the case could not be disposed of by summary judgment under the prevailing view.

Only in rare circumstances could summary judgment result from the fact scenario outlined above. If, for example, plaintiff had given deposition or other sworn testimony inconsistent with its affidavit claiming estoppel and reliance, defendant could produce this and a court could find that plaintiff's creation of the fact dispute was not "genuine" within the meaning of rule 56 because of plaintiff's apparent eleventh hour fabrication of facts to meet an unexpected legal argument. The general rule is that affidavits submitted in opposition to a summary judgment motion may explain statements made in deposition or hearing but will not be heard to

generally not resolved by a summary judgment. They ordinarily evoke conflicting testimony and the 'reasonableness' of the actor's conduct, both of which are traditionally for the jury to determine." *Id.* at 705.).

See also J. LANDERS & J. MARTIN, *CIVIL PROCEDURE* 31-32, 615-30 (1981) (most courts consider conflicting affidavits to create genuine issue of material fact even if movant produced more or better affidavits). This text also discusses the "most famous summary judgment case" of *Arnstein v. Porter* and also excerpts *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974), in which the court denied summary judgment to a movant whose affidavits denied having the requisite mental state required by the statutory claim of wrongful discharge, saying "[I]f improper motive could reasonably be inferred from facts before the court, sworn denials of such intentions do not remove the issue from the case so as to entitle the party to judgment." *Id.* at 918. See also P. CARRINGTON & B. BABCOCK, *CIVIL PROCEDURE* 551 (2d ed. 1977) [hereinafter CARRINGTON] ("[O]ne possible meaning of a genuine issue of fact is that both sides can present substantial evidence sufficient to merit jury consideration. But the substantial evidence test [for directed verdict motions] is applied after the proof is in, and the summary judgment test must be applied on the proof in prospect. Therefore, the summary judgment test is more rigorous, admitting of even less doubt.").

In their supplements appearing after *Matsushita*, *Liberty Lobby*, and *Calett*, the major civil procedure texts generally restricted themselves to excerpting or noting one or more of these cases but did not characterize these decisions as either changing rule 56 or as consistent with rule 56. See, e.g., COUND, *supra* note 11, at 393-403 (1987 Supp.); D. LOUISELL, G. HAZARD & C. TAIT, *PLEADING AND PROCEDURE* 17-34 (1987 Supp.); ROSENBERG, *supra*, at 50-51 (1987 Supp.) (also citing *Knight v. U. S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1570 (1987), and noting that the "message sent in these [Supreme Court] decisions has not escaped the attention of the lower courts.").

279. See, e.g., COUND, *supra* note 11, at 772-88; WRIGHT, MILLER & KANE, *supra* note 17, at § 2725.

contradict sworn testimony.²⁸⁰ At a minimum, the plaintiff would then likely be subject to some rather major sanctions pursuant to rule 56(g) for submitting an affidavit in bad faith when the judge in mid-trial determined that the deposition testimony governed and granted defendant's rule 50(a) motion for directed verdict.

The accepted federal civil procedure authorities were also uniform in declaring the standard for directed verdict. A court was empowered by rule 50(a) to grant a directed verdict for the defendant at the close of plaintiff's case-in-chief or for either party at the close of the evidence when the nonmovant's evidence in opposition to the motion was not sufficient to support the verdict of a reasonable jury in its favor.²⁸¹ In other words, a directed verdict was appropriate when no significant admissible evidence in the record could support a reasonable jury's verdict for the nonmovant.²⁸² This general rule for the directed verdict is quite different from that enunciated for summary judgment. Even those commentators who saw similarity in the two standards and advocated more of a directed verdict approach to summary judgment recognized this difference.

Although one leading treatise, Wright and Miller, has gone so far as to state that the directed verdict motion "rests on the same theory" as a summary judgment motion²⁸³ and that the primary distinction between the two motions is one of timing,²⁸⁴ this work also noted other distinctions and was careful not to treat the two motions as congruent.²⁸⁵ One principal distinction the authors stressed was that:

280. See *Camfield Tires v. Michelin Tire Corp.*, 719 F.2d 1361, 1366 (8th Cir. 1983).

281. See *Herr*, *supra* note 18, at 474-75; *Wright*, *supra* note 17, at 640-43. According to Professor Wright, "the case must go to the jury if conflicting inferences may legitimately be drawn from the facts," but the concept of a legitimate inference has proven to be an illusive one. *Wright*, *supra* note 17, at 641. The Supreme Court had, prior to 1986, seemed to favor a broad definition of legitimate inference, one favoring submission of claims to the jury when the nonmovant's requested inference was not foreclosed by uncontested evidence of record to the contrary. See *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) ("whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference").

282. See *Brady v. Southern Ry.*, 320 U.S. 476 (1943); *King v. Ford Motor Co.*, 597 F.2d 436 (5th Cir. 1979).

283. See *Wright, Miller & Kane*, *supra* note 17, § 2713.1, at 613. Perhaps the strongest pre-*Liberty Lobby* statement in favor of its approach was that of Professor Moore, who stated that summary judgment must be denied when there "is contradictory evidence, or the movant's evidence is impeached, [or] an issue of credibility is present, provided that the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds." *Moore*, *supra* note 164, at ¶ 56.15[4]. Although this approach tends to equate the summary judgment with a fact-assessing directed verdict test, Professor Moore's commentary read as a whole suggests that, at least at the summary judgment stage of litigation, courts find most admissible nonmovant evidence to be within the realm of the not too incredible or unreasonable. Even courts approvingly quoting Moore's passage have, on the merits, been solicitous of any evidence preferred by the nonmovant. See, e.g., *Russell v. Mid-East Oil Co.*, 417 F. Supp. 440, 443 (W.D. Pa. 1976). But see *Appolonio v. Baxter*, 217 F.2d 267 (6th Cir. 1954) (affirming grant of summary judgment and acknowledging that it is conceivable, but improbable, that nonmovant could prove facts to support a reasonable jury's verdict).

284. See *Wright, Miller & Kane*, *supra* note 17, § 2713.1, at 614.

285. A closer examination of the cases cited in Wright and Miller to support the linkage between summary judgment and directed verdict suggests that the courts, while in dicta frequently paying homage to the theoretical similarities between the motions, have usually taken a far more restrictive approach to both summary judgment and directed verdict than did the *Matsushita* and *Liberty Lobby* Courts. In the majority of the cases cited in Wright and Miller, the courts have engaged in no evaluation or assessment of the probative force of either side's evidence. Rather, the courts have for the most part granted summary judgment only when the nonmovant submitted no evidence, not even the proverbial "scintilla" in support of its claims or in rebuttal of movant's submissions. See, e.g., *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980) (whether nonmovant's evidence is of sufficient probative force is a question for jury; court may not grant summary judgment even if convinced nonmovant will lose at trial); *THL-Hawaii Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991 (9th Cir. 1980); *Roberts v. Browning Inc. of Utah*, 610 F.2d 528 (8th Cir. 1979); *Charbonnages De France v. Smith*, 597 F.2d 406 (4th Cir. 1979); *American Mfrs. Mut. Ins. Co. v. ABC-Paramount Theatres*, 388 F.2d 272 (2d Cir.

On a summary judgment motion the court is not permitted to rule on the credibility of the material that is presented. When there is an issue whether the testimony of an affiant or deponent would be credible if presented at trial, the court must deny summary judgment and leave that question to be resolved by the finder of fact. However, a directed verdict motion typically would be made after the witness had testified and the court could take account of the possibility that he either could not be disbelieved or believed by the jury."²⁸⁶

1967), *cert. denied*, 404 U.S. 1063 (1972); *Doff v. Brunswick Corp.*, 372 F.2d 801 (9th Cir. 1967); *Empire Elec. Co. v. United States*, 311 F.2d 175 (2d Cir. 1962); *Radio City Music Hall Corp. v. United States*, 135 F.2d 715 (2d Cir. 1943); *Siever v. Beechcraft Mfg. Co.*, 497 F. Supp. 197 (E.D. La. 1980); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977); *Coleman v. Dover Corp.*, 384 F. Supp. 1401 (E.D. Tenn. 1974), *aff'd without opinion*, 508 F.2d 843 (6th Cir. 1975); *McKinney v. Armco Steel Corp.*, 270 F. Supp. 854 (W.D. Pa. 1967); *Bass v. Southern Pac. Co.*, 196 F. Supp. 763 (D. Ore. 1961); *Braughton v. United Air Lines, Inc.*, 189 F. Supp. 137 (W.D. Mo. 1960); *Riss & Co. v. Association of Am. R.R.s.*, 190 F. Supp. 10 (D.D.C. 1960); *United States v. Daubendick*, 25 F.R.D. 50 (N.D. Ia. 1959); *United States v. 162 Cases Containing Approximately 415 Proof Gallons of Distilled Spirits*, 138 F. Supp. 820 (S.D.N.Y. 1956); *Myers v. District of Columbia*, 17 F.R.D. 216 (D.D.C. 1955); *Mutual Life Ins. Co. of N.Y. v. Ballard*, 1 F.R.D. 180 (S.D. Fla. 1940).

A significant number of the cases cited in the Wright and Miller footnote granted summary judgment not because the court made assessments of the competing evidence but because the legal aspect of nonmovant's claims were rejected as a matter of law. *See, e.g.*, *Taray v. Moldavanyi*, 478 F. Supp. 1120 (E.D.N.Y. 1979); *United States v. New England Merchants Nat'l Bank*, 465 F. Supp. 83 (D. Mass. 1979); *United States v. Golden Fifty Pharmaceutical Co.*, 421 F. Supp. 1199 (N.D. Ill. 1976); *Cousins v. Yaeger*, 394 F. Supp. 595 (E.D. Pa. 1975); *Davies v. Collins*, 349 F. Supp. 62 (E.D. Ky. 1972); *United States v. Artman*, 320 F. Supp. 474 (E.D. Tenn. 1970), *aff'd on other grounds*, 435 F.2d 1374 (6th Cir. 1971); *United Serv. Auto Ass'n v. United States*, 285 F. Supp. 854 (E.D.N.Y. 1968); *Miller v. Hoffman*, 1 F.R.D. 290 (D.N.J. 1940).

Of the many cases cited in the Wright and Miller footnote, only a few can be fairly read as supporting either a summary judgment or directed verdict doctrine that permits judges to evaluate competing evidence beyond the court's obvious need to ascertain that the nonmovant's evidence is not fabricated, self-contradicted, or conclusively disproven by its variance from known reality. *See Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978); *United States v. General Motors Corp.*, 518 F.2d 420 (D.C. Cir. 1975); *Kern v. Tri-State Ins. Co.*, 386 F.2d 754 (8th Cir. 1968); *Wolf v. Schaben*, 272 F.2d 737 (8th Cir. 1959); *Wetzel v. Eaton Corp.*, 62 F.R.D. 22 (D. Minn. 1973).

These cases do not provide a firm foundation for the new summary judgment erected by *Matsushita* and *Liberty Lobby*. *Wetzel*, for example, suggested the type of evidence necessary to withstand summary judgment but found that nonmovants had not developed such evidence during discovery or shown likelihood of unearthing evidence. Although *Wetzel* discusses the directed verdict in its strongest formulation—the notion that nonmovant's requested fact inference must "reasonably preponderate" over that of the movant (*id.* at 26)—it also acknowledges that the federal directed verdict standard since *Lavender v. Kurn*, 327 U.S. 645 (1946), has been highly deferential to jury consideration. Although there is ample rhetoric comparing summary judgment and directed verdict, the type of directed verdict doctrine envisioned by these cases is not the aggressive, fact-weighting directed verdict of *Liberty Lobby* but rather the milder directed verdict that could not be granted when the nonmovant either put forth submissions to discredit the movant's evidence or submitted "some opposing evidence" of its own. *See Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 718 (2d Cir. 1943).

286. WRIGHT, MILLER & KANE, *supra* note 17, § 2713.1, at 614 (citations omitted). *See also* JAMES & HAZARD, *supra* note 11, § 7.13, at 355–57 discussing the varied applications of directed verdict doctrine and what this Article terms the divergent "aggressive" and "mild-mannered" approaches of the courts:

So far as credibility goes, all courts consider it on a motion for directed verdict to the minimum degree of determining whether testimony is capable of belief by reasonable people or is incredible as a matter of law. No court will let a jury base a verdict on testimony that is flatly contradicted by indisputable physical facts or laws of nature, but few, if any courts are willing to go much further than that. The real differences, for the most part, are in the willingness to find contradiction with physical facts or some other basis for declaring evidence incredible as matter of law. Even here there is today a fairly uniform reluctance to go very far in taking matters of credibility from the jury. The apparent differences lie in nomenclature. Some courts call the problem described in this paragraph one of credibility, others do not. . . . [T]he tendency has probably been in the direction of allowing the jury greater latitude in drawing inferences, notably in personal injury tort cases.

Id. (emphasis in original, citations omitted).

This passage serves to emphasize two other points already made in this Article. First, courts have traditionally engaged in more evaluation of witness credibility in deciding directed verdict motions than they have in deciding summary judgment motions. In that sense, the two doctrines do not "mirror" each other as asserted by the *Liberty Lobby* majority. Second, traditional directed verdict jurisprudence gave most courts less authority to weigh evidence than that suggested in *Liberty Lobby*.

One need only conduct a cursory review of the Court's actions in *Matsushita* and *Liberty Lobby* to see how far beyond this "hornbook law" the Court ventured in its zeal to grant summary judgment. In *Matsushita*, the Court, without the benefit of live testimony, in effect held that plaintiffs' expert witness affidavits and planned trial witnesses could not be believed by the factfinder as to their conclusions that the defendants engaged in predatory pricing actions despite a failure to reap monopoly profits for more than twenty years. In *Liberty Lobby*, the Court held that the jury would not be free to disbelieve the defendants' averred absence of malice despite going to press with defamatory statements based on an unknown source and a previously disputed article. Although both of these conclusions by the Court may have been more likely to be accepted by the factfinder than the scenarios proffered by the *Matsushita* and *Liberty Lobby* plaintiffs, one can hardly say that plaintiffs' views are so unreasonable that no rational jury could agree with them.

The Wright and Miller treatise also noted as one similarity between summary judgment and directed verdict that in both instances "all inferences are drawn in favor of the nonmoving party."²⁸⁷ The Court in fact rejected as too remote the inferences asked by the plaintiffs in *Matsushita* and *Liberty Lobby*. In effect, the Court determined that it would not allow the factfinder to draw the inference that Japanese consumer electronics companies wait patiently to reap monopoly profits or that they have other business motives for selling below cost. The Court also would not draw the inference that publishing defamatory statements from suspect sources was reckless disregard of the truth. Although these inferences do not seem all that unreasonable, the Court found them to be so outlandish that they could be ignored. This treatment appears to have altered the traditional directed verdict doctrine as well as summary judgment doctrine and underscores the case-specific errors in these two holdings.

Commentators suggesting a close relationship between the jurisprudence of rule 56 and that of rule 50 were also unanimous in noting that the judge should not grant summary judgment even when he or she would be compelled after trial on the instant record to set aside a verdict for the nonmovant and order a new trial or grant judgment n.o.v.²⁸⁸ The inquiry of the judge at the summary judgment stage was to be limited to ascertaining whether there was any legitimate evidence of record and any rational

287. WRIGHT, MILLER & KANE, *supra* note 17, § 2713.1, at 615. According to Professor Wright:

The correct rule seems to be that the court may consider all of the evidence favorable to the position of the party opposing the motion as well as any unfavorable evidence that the jury is required to believe. Thus it may take into account evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that this evidence comes from disinterested witnesses.

WRIGHT, *supra* note 17, at 642 (citing *Simblest v. Maynard*, 427 F.2d 1, 5 (2d Cir. 1970); *Negron v. Ward*, 458 F. Supp. 748, 756 (S.D.N.Y. 1978); Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 948-53 (1971); and WRIGHT, MILLER & KANE, *supra* note 17, § 2529).

288. See WRIGHT, MILLER & KANE, *supra* note 17, § 2713.1, at 619 (citing favorably *Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F.2d 359, 363 (5th Cir. 1945) ("Only when the evidence is such that it is clear the jury would have none to go on, . . . can the motion [for summary judgment] be sustained and a jury trial denied." (emphasis added))). Courts have expressly recognized that, in effect, the judge's opinion as to the true merits of the case must be held with greater certainty for a summary judgment grant than for a directed verdict grant. See, e.g., *Stanley v. Guy Scroggins Constr. Co.*, 297 F.2d 374 (5th Cir. 1961); *Armco Steel Corp. v. Realty Inv. Co.*, 273 F.2d 483, 485 (8th Cir. 1960).

inferences therefrom that tended to support the nonmovant's claimed version of events and theory of the case. If so, the judge, even one treating the decision as akin to a directed verdict calculus, was bound to deny summary judgment.²⁸⁹

Professor Wright, in his one-volume treatise on the subject, although not addressing in detail the relation between rules 56 and 50 as in the Wright and Miller treatise, used language to describe the summary judgment process that implicitly rejected the complete directed verdict analogy of *Liberty Lobby*. "On a motion for summary judgment the court cannot try issues of fact. It can only determine whether there are issues to be tried."²⁹⁰ He continued: "[though] it may be surmised that the non-moving party is unlikely to prevail at the trial [that] is not sufficient to authorize summary judgment against him."²⁹¹

Professors James and Hazard, although noting the close theoretical relation between summary judgment and directed verdict, also treat the two as distinct and note that the authorities "agree also that summary judgment should be denied if the evidence at trial stood in the same posture as the material on file upon the motion."²⁹² Both of these hornbook expressions of a court's required fact deference to the jury and inference deference to the nonmovant in ruling on rule 50(a) motions seem disregarded by the Supreme Court's actual conduct in *Matsushita* and *Liberty Lobby*. Even one of the most direct advocates of toughening the summary judgment standard through rigorous application of directed verdict principles stated that under his construct "summary judgment can never be granted when the evidence could reasonably support a finding for either side."²⁹³

To be sure, the commentators had consistently criticized judicial opinions suggesting that summary judgment was extremely difficult to obtain,²⁹⁴ could only be

289. See WRIGHT, MILLER & KANE, *supra* note 17, § 2713.1, at 619-20. In deciding a directed verdict motion, a court may take into account evidence supporting the moving party that is uncontradicted and unimpeached, if the evidence comes from disinterested sources. Unfavorable evidence proffered by the movant that contradicts the favorable evidence on behalf of the nonmovant "must be disregarded." *Id.* at 573 (citations omitted). Accord Cooper, *supra* note 287, at 948-53.

290. WRIGHT, *supra* note 17, at 664.

291. *Id.* at 668 (citing *Hayden v. First Nat'l Bank of Mt. Pleasant*, 595 F.2d 994, 997 (5th Cir. 1979); *Jobson v. Henne*, 355 F.2d 129, 133 (2d Cir. 1966); *Harl v. Acacia Mut. Life Ins. Co.*, 317 F.2d 577 (D.C. Cir. 1963)).

292. JAMES & HAZARD, *supra* note 11, § 5.19, at 276 (citing *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944)). The authors' citation of *Sartor* for the proposition that summary judgment is improper when the record would not require a directed verdict, is interesting. For years, the *Sartor* opinion was viewed as one that, although comparing rule 50 and rule 56, made summary judgment too hard to obtain by suggesting that it must be denied where the movant's testimony is interested. See, e.g., Sonenshein, *supra* note 18, at 802. The Court in *Liberty Lobby*, however, cited *Sartor* to support its thesis that judges could employ the fact evaluating approach of aggressive directed verdict jurisprudence to summary judgment motions. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2512 (1986).

293. Sonenshein, *supra* note 18, at 793.

294. See, e.g., *Amstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), criticized in JAMES & HAZARD, *supra* note 11, § 5.19, at 276-77; WRIGHT, MILLER & KANE, *supra* note 17, § 2727, at 174-75. A respected district judge was sufficiently frustrated by the "slightest doubt" cases in the Second Circuit, that he denied one summary judgment motion with the following, oft-quoted editorial detour:

On these facts we would be inclined to grant summary judgment. But, in this Circuit at least, District Courts may not rely to any substantial extent on summary judgment predicated upon testimonial proof to avoid a full trial even though a recovery seems hopeless. . . . Since courts are composed of mere mortals they can decide matters only on the basis of probability, never on certainty. The "slightest doubt" test, if it is taken seriously, means that summary judgment is almost never to be used—a pity in this critical time of overstrained legal resources.

Chubbs v. City of New York, 324 F. Supp. 1183, 1189 (E.D.N.Y. 1971) (Weinstein, J.). But see Bracht, *Has Summary*

granted in the clearest of cases,²⁹⁵ or could not be granted if there was the "slightest doubt" as to the correctness of the decision.²⁹⁶ In criticizing these cases for taking a view of rule 56 too hostile to the movant, the commentators never suggested that rule 56 was really rule 50(a). Rather, the prevailing view was that "good" courts would ignore the overblown dicta of cases taking too narrow a view of the rule and restricting its use.²⁹⁷ Instead, wise judges would take a hard look at the genuineness of nonmovant evidence, particularly affidavit testimony, and would be similarly careful not to consider any trivial factual controversies as creating a genuine issue of material fact. The legal issue presented in the summary judgment motion guided courts in determining what was material.²⁹⁸ In this way, combined with a willingness to look hard at the legal relevance of opposition to the motion, courts could effectively employ summary judgment without weighing facts and usurping the traditional jury role.

Unlike the standard authorities, the reformist commentators²⁹⁹ believed that rule 56 would not become truly effective at eliminating needless trials and streamlining litigation until it permitted judges more authority to label a nonmovant's evidence unconvincing, as did rule 50(a),³⁰⁰ or to account for the burden of persuasion³⁰¹ and standard of proof at trial³⁰² in deciding rule 56 motions. In effect, these authorities tended to support this Article's thesis that the pre-*Liberty Lobby* summary judgment standard never permitted judges as much fact evaluating power as traditional directed verdict practice and certainly never granted judges the "license to weigh" facts suggested by the prose and results of *Matsushita* and *Liberty Lobby*.

Again, a certain amount of controversy, if not confusion and contradiction, must be conceded when discussing the commentators' views as to the identity of the "real" summary judgment, particularly the question of what constitutes a "genuine"

Judgment Been Eliminated in the Second Circuit?, 46 BROOKLYN L. REV. 565 (1980) (practitioner author argues that despite notoriety of *Arnstein* and other cases in which the Second Circuit adopted Judge Jerome Frank's restrictive dicta of summary judgment, most Second Circuit cases since the mid-1960s have followed a more apt approach to summary judgment, as set forth in cases such as *Dressler v. The MV Sandpiper*, 331 F.2d 130 (2d Cir. 1964)). *Accord* *Pierce*, *supra* note 25.

295. See, e.g., *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181, 1187 (S.D.N.Y. 1971) (denying summary judgment motion although court noted "apparent flimsiness of plaintiff's claim," suggesting that the claim would be dismissed on the same record at trial). Although the approach of *United Rubber Workers* may be criticized, as were the "slightest doubt" cases, it illustrates how courts typically distinguished the showing required to obtain summary judgment with that needed for directed verdict. See also *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 71 F. Supp. 459, 460 (E.D.N.Y. 1947).

296. See, e.g., *Tomalewski v. State Farm Life Ins. Co.*, 494 F.2d 882 (3d Cir. 1974), criticized in *WRIGHT, MILLER & KANE*, *supra* note 17, § 2727 at 176-78; Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 504 (1950) [hereinafter *Special Problems*].

297. See, e.g., *HERR*, *supra* note 18, at 355 (courts, by applying "literal language" of rule 56 rather than "slightest doubt" dicta, can make effective and frequent use of summary judgment motion); *WRIGHT, MILLER & KANE*, *supra* note 17, at §§ 2712, 2719.

298. See *WRIGHT, MILLER & KANE*, *supra* note 17, § 2725, at 93-95, cited with approval in *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, _____, 106 S. Ct. 2505, 2510 (1986).

299. See *supra* note 272.

300. See, e.g., *Currie*, *supra* note 20; *Schwarzer*, *supra* note 19; *Sonenshein*, *supra* note 18.

301. See, e.g., *Louis*, *supra* note 18; *Pollak*, *supra* note 272.

302. See, e.g., *Actual Malice*, *supra* note 272, at 716-21. Courts deciding summary judgment motions seldom engage in fact evaluation when deciding a motion, especially when state of mind is at issue, but tend to "deny summary judgment automatically." *Id.* at 716, 708-10, 716.

issue of material fact. As Wright and Miller note, some courts have seen a genuine issue as "one that can be maintained by substantial evidence,"³⁰³ while others see a genuine dispute as a "real" or substantial dispute of material fact.³⁰⁴ Still others phrase the test as whether there is any "issue requiring a trial."³⁰⁵ In other cases, the courts have explicitly used the directed verdict analogy.³⁰⁶

Nonetheless, after wading through this semantic swamp, Professors Wright and Miller conclude with language that, despite the ambiguity of employing a "reasonable man" test, makes summary judgment sound different from the directed verdict and nothing like the Supreme Court at work in *Matsushita* and *Liberty Lobby*. Professors Wright and Miller state:

[A] party moving for summary judgment is not entitled to judgment merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears the adversary is unlikely to prevail at trial. . . . Therefore, if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper.³⁰⁷

On a practical level as well, trial judges and practitioners have always viewed summary judgment and directed verdict as different.³⁰⁸ Those who have clerked for or appeared before federal district judges and state judges applying similar laws have heard candidly expressed the greatest disdain for a nonmovant's evidence coupled with the recognition that the nonmovant has nonetheless entered into the record nonfabricated evidence conflicting with that of the movant over an important fact. Lawyers at pretrial conferences and hearings on rule 56 have frequently heard judicial comments something like this: "Well, Mr. Movant, there certainly appears to be a factual dispute here, so I don't see how I can grant summary judgment. However, Ms. Nonmovant, I don't think the jury will be very impressed with your case. I'm not absolutely sure I would even let it go to the jury unless your evidence looks better at trial than it does in your motion papers. Maybe you two and your clients could

303. See WRIGHT, MILLER & KANE, *supra* note 17, § 2725, at 103. See also *Hahn v. Sargent*, 523 F.2d 461 (1st. Cir. 1975), *cert. denied*, 425 U.S. 904 (1976); *Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F.2d 359, 362 (5th Cir. 1945) (leading cases, frequently cited within their circuits when setting forth the basic summary judgment tests).

304. See WRIGHT, MILLER & KANE, *supra* note 17, § 2725, at 103 n.32.

305. See WRIGHT, MILLER & KANE, *supra* note 17, § 2725, at 103. Cited in support of the school of thought that a "genuine issue" within the meaning of rule 56 is one "requiring a trial" is *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464 (1962), a case that, despite the presence of the "trial" language, can hardly be characterized as suggesting that trial judges have any authority to evaluate the probative value of competing facts on a summary judgment record. Quite the contrary, *Poller*, which stated that summary judgment is seldom apt in cases turning on motive or state of mind, is often cited or criticized as containing language discouraging the use of summary judgment. See *supra* text accompanying notes 183-89.

306. See WRIGHT, MILLER & KANE, *supra* note 17, § 2725, at 104 (citing *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944)). As discussed, *Sartor*, although it contains language linking summary judgment and directed verdict, cannot, when read as a whole, support either the language or the results of *Liberty Lobby* or *Matsushita*. See *supra* text accompanying notes 165-78.

307. WRIGHT, MILLER & KANE, *supra* note 17, § 2725, at 104-09 (citations omitted).

308. See Sandler & Corderman, *Winning a Summary Judgment*, 60 LITIGATION 15, 17 (1984) ("[practice of viewing record in light most favorable to nonmovant] comes from the theory that courts considering summary judgment motions do not actually decide issues of fact. That means the court must give the other side the benefit of every doubt."). See also Pielemeier, *Summary Judgment in Minnesota: A Search for Patterns*, 7 WM. MITCHELL L. REV. 147 (1981) (practitioners expect to lose summary judgment motions when opponent places even unconvincing evidence in record in opposition to motion).

sharpen your pencils and talk about settlement before we get too much further. For now, however, I'm denying Mr. Movant's rule 56 motion."³⁰⁹

Most of the commentators have observed that many, if not most, trial courts take this type of approach to summary judgment, showing a deference to even seemingly weak nonmovant evidence that would not exist in the directed verdict context.³¹⁰ Often, this observation is presented as a criticism, with the implicit suggestion that judges treat summary judgment as different from the directed verdict because they are lazy, timid, or simply misunderstand rule 56.³¹¹ Although some of this criticism may be valid, the critics seemingly eliminate without consideration another possible explanation—that trial judges appreciate both the literal language of rule 56 and the differing quality of factual certainty resulting from trial.

Judges such as the one in the above mythical conversation know that some parties' scenarios do not sound very persuasive in opposition to a summary judgment motion. So what? Some complaint allegations look like losers as well yet are legally sufficient to withstand a motion to dismiss for failure to state a claim.³¹² Prior to 1986, judges generally refrained from granting summary judgment so long as the nonmovant had some nonfabricated, colorable evidence supporting its view of events. Those critical of this approach have not articulated a convincing reason why so many smart federal district judges would be willing to subject themselves to needless trials if they believed they could dismiss claims without sacrificing the quality of justice.

Although some summary judgment denials undoubtedly result from oversight or error or from a desire to heighten uncertainty in the interest of encouraging settlement, my own view is that most judges intrinsically understand that their own conclusions, based on even a well-developed pretrial record, are not necessarily the same as or convincingly more correct than the conclusion of a jury at trial. First, the judge's orientation, background, and outlook differ from that of a jury. Second, the facts are more sharply developed at trial. This includes both specific facts and, perhaps more importantly, the context of events from which the factfinder will make inferences and conclusions. These comparative advantages of trial facts as opposed to affidavit facts are more fully developed in subpart III(D).³¹³

2. *The Real Summary Judgment: A Rule with Multiple Personality*

Although there existed, and continues to exist, some confusion and contradictory statements concerning the "real" meaning of rule 56, most authorities, lower courts, commentators, and the Supreme Court's own precedents would not go as far as did the *Liberty Lobby* language in transforming rule 56 into a "super directed verdict device" nor as far as *Matsushita*'s implicit permission for trial judges to

309. This mythical conversation resembles statements allegedly made by the district court judge in the Agent Orange litigation, in which the court did not make pretrial fact findings but hinted at likely trial outcomes to spur settlement. See Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 360 (1986).

310. See WRIGHT, MILLER & KANE, *supra* note 17, § 2727, at 175-78.

311. See, e.g., Louis, *supra* note 18, at 749, 758; Sonenshein, *supra* note 18, at 785.

312. See Marcus, *supra* note 7, at 484.

313. See *infra* text accompanying notes 386-408.

weigh facts and theories in deciding a motion for summary judgment. A more dispassionate, less result-oriented, and more comprehensive review of summary judgment jurisprudence in the federal courts suggests three more or less separate strands of summary judgment perspective. On one prong were the many cases seemingly treating summary judgment as an extraordinary remedy, one that should only be granted when there was not the "slightest doubt" as to the actual facts.³¹⁴ This was the line of cases widely criticized as misreading rule 56 and placing an erroneous "judicial gloss" on the text of the rule.³¹⁵

On the opposite prong was a group of cases comparing the theory of summary judgment with that of directed verdict.³¹⁶ This approach was generally viewed with favor by the commentators,³¹⁷ although some thought it did not give rule 56 sufficient strength to eliminate claims likely to fail at trial.³¹⁸ While lending some support to the *Liberty Lobby* majority, this line of cases stopped far short of equating summary judgment and directed verdict in all respects. This view of rule 56 recognized the obvious difference in timing between a summary judgment motion and a directed verdict motion. This perspective also appreciated other differences: the more complete directed verdict record; the differing qualities of proof; the contributions of a jury; the availability and quality of cross-examination; the opportunity to observe witnesses; and the explanation of documents.³¹⁹ In addition, this view recognized that despite similarity in theory the directed verdict worked differently in practice from summary judgment in that the judge deciding the directed verdict motion had at least some freedom to assess the probative value of evidence according to a "reasonable jury" standard while the judge deciding a rule 56 motion had no such freedom.³²⁰

314. See, e.g., *Tomalewski v. State Farm Life Ins. Co.*, 494 F.2d 882 (3d Cir. 1974); *Clausen & Sons, Inc. v. Hamm Brewing Co.*, 395 F.2d 388 (8th Cir. 1968).

315. See, e.g., *WRIGHT, MILLER & KANE*, *supra* note 17, § 2727, at 176-78; *Special Problems*, *supra* note 296, at 504.

316. See *WRIGHT, MILLER & KANE*, *supra* note 17, § 2713.1, at 616 & n.11. However, Wright and Miller also recognize that, at a minimum, some courts have been more reluctant to grant summary judgment because the motion is presented at an earlier stage of the litigation than a directed verdict motion. *Id.* at 617-18. Upon closer examination, the cited cases stop significantly short of equating summary judgment and directed verdict as did *Liberty Lobby*. For example, the leading case cited in the note is *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944). As discussed earlier, *Sartor* may contain one shred of dicta equating the two but the overall approach of *Sartor* reveals something quite different. See *supra* text accompanying notes 165-78.

Another case cited is the famous *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946). See *supra* text accompanying notes 250-62. In *Arnstein* Judge Jerome Frank's "slightest doubt" standard making summary judgment difficult to obtain won out, at least in the dicta, over the middle level view of summary judgment held by Federal Rules draftsman Judge Charles Clark. Citing *Arnstein* as support for the school of thought treating summary judgment as a pretrial directed verdict seems somewhat like characterizing Caspar Weinberger as America's leading peacenik.

Even those cases that take a strong view equating summary judgment and directed verdict are using a passive directed verdict standard, one that permits the case to be taken away from the jury only when the claimant has produced no evidence in its favor on a material point or no evidence that would permit a colorable inference in claimant's favor. See, e.g., *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977) (an essential element of claim cannot be found by jury "for want of evidence").

317. See *WRIGHT, MILLER & KANE*, *supra* note 17, § 2713.1, at 619-20; *Currie*, *supra* note 20, at 79; *Sonenshein*, *supra* note 18, at 783.

318. See *supra* authorities cited at note 272.

319. See, e.g., *Smith v. Blackledge*, 451 F.2d 1201 (4th Cir. 1971); *Armco Steel Corp. v. Realty Inv. Co.*, 273 F.2d 483 (8th Cir. 1960); *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir.), *cert. denied*, 342 U.S. 887 (1951).

320. See, e.g., *Briggs v. Kerrigan*, 431 F.2d 967 (1st Cir. 1970); *Devex Corp. v. Houdaille Indus., Inc.*, 382 F.2d 17 (7th Cir. 1967); *Cox v. English-Am. Underwriters*, 245 F.2d 330 (9th Cir. 1957). See also *James, Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218, 219-22 (1961). In assessing federal

The middle prong of summary judgment jurisprudence rejected the "slightest doubt" cases as both wrong and too restrictive to make rule 56 useful for pretrial disposition of cases and also stopped short of importing the directed verdict standard into rule 56. Instead, this school of thought took a stringent view of what disputed facts were actually "material" to the legal question before the court and also was stringent in requiring the nonmovant to produce admissible, uncontradicted, internally consistent material in opposition to the motion, requiring more than mere assertion by the nonmovant.³²¹ According to this view, rule 56 was effective in eliminating unsuccessful or meritless claims even when the judge could not assess a nonmovant's evidence as weak or unpersuasive.³²² Consequently, there was no need

directed verdict practice, Professor James found that courts will not submit a case to the jury unless the court viewed the claimant's evidence as "sufficient." This required more than a scintilla or small amount of evidence favoring the nonmovant; evidence sufficient to support the verdict of a reasonable jury was required, and this necessarily placed the judge in the role of occasionally evaluating the relative probative worth of competing evidence. To James, the stated rule seemed to be that if the nonexistence of an essential element of a claim was as probable as its existence, a verdict would be directed. In addition, courts could deem some testimony incredible as a matter of law and some inferences irrational and impermissible. However, courts in practice were more restrained in directing verdicts and more reluctant to take a case from the jury. See also HARPER, JAMES & GRAY, *supra* note 94, at § 15.2.

321. See HERR, *supra* note 18, § 16.1.10, at 355-56. See also *Berry v. Atlantic Coast Line R.R.*, 273 F.2d 572, 581-82 (4th Cir.), *cert. denied*, 362 U.S. 976 (1960) (summary judgment granted in negligence case when defendant had set forth affidavit and documentary evidence of reasonable conduct and plaintiff responded only with allegations of negligence; court did not find need to evaluate conflicting facts); *American Airlines v. Ulen*, 186 F.2d 529, 531-32 (D.C. Cir. 1949) (summary judgment granted for plaintiff when defendant's answers to interrogatories and produced documents showed defendant to have violated its own rule for safe flight plans; no fact conflict and no court assessment of competing facts).

322. A frequently cited empirical study—McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. LEGAL STUD. 427 (1977) [hereinafter McLauchlan], provides some support to the Court's contention that rule 56 has not met the profession's expectations as a case disposition and docket-thinning device. *Id.* at 458 (summary judgment motion "is a very weak reed upon which to rely for decreasing much of the workload with which courts are faced"). As a whole, however, McLauchlan's data supports the rationale of the pre-*Liberty Lobby* middle prong of summary judgment cases. Examining the Northern District of Illinois, McLauchlan found that summary judgment motions were made in only 4% of the cases studied during 1970 (80 of the sample of 1,984) and concluded that this showed the "unimportance of this motion as the means of disposing of many cases." *Id.* at 452. Even that low figure may be inflated because it appears McLauchlan considered rule 12(b)(6) motions in his sample as well. *Id.* at 427 n.1. If McLauchlan did this with rule 12(b)(6) motions that were not accompanied by affidavits or other materials and therefore converted to rule 56 motions by the court, McLauchlan's study possesses a serious flaw.

Also, if the 4% figure includes both rule 56 and rule 12(b)(6) motions, it is highly counterintuitive to litigators. Based on my own brief experience as a federal district court law clerk and an associate in a law firm that conducted a varied litigation practice, I would estimate that either a rule 12(b)(6) or rule 56 motion for at least partial relief is made in approximately 75% of all litigated cases. But see Resnick, *Failing Faith: Adjudicating Procedure in Decline*, 53 U. CHI. L. REV. 494, 547 (1986) (noting that 40% of federal cases are docketed without any court action). My estimate of the frequency of summary judgment motions applies to those cases that are sufficiently litigated to involve some court activity.

Notwithstanding this suggestion and assuming that the court records are either more accurate or more representative than my own impressions, the McLauchlan study also suggests that a tougher rule 56 or rule 56 interpretation designed to make summary judgment easier to obtain is unlikely to rapidly reduce court dockets. Even if *Matsushita* and *Liberty Lobby* have made summary judgment twice as likely to be granted as before, it is unlikely that a terrifically large proportion of the 96% of cases in which the motion previously went unmade would see the motion and its grant under the "new" summary judgment decreed by the Court. When the motion is made and denied, one can argue that summary judgment has increased the time and cost of litigation rather than reducing it. Read as a whole, however, the study argues against the Court's implicit notion that the motion is too seldom granted due to misplaced judicial reliance on past case dicta. The empirical study in fact shows that the summary judgment motion, although not made in a large percentage of cases, is often granted and affirmed, suggesting that prior to *Matsushita* and *Liberty Lobby*, federal courts were often able to employ rule 56 to grant summary judgment so long as the litigants presented the motion. McLauchlan's study found that summary judgment, when sought, was on average granted half the time and that these grants were on average affirmed in more than half the appeals. McLauchlan, *supra*, at 458. Summary judgment was quite successful in contract, tort, and real property matters, although less successful in so-called "statutory" matters (a large category of cases consisting of

to look to the “reasonable jury” standard of rule 50(a) to provide force to summary judgment as well as the potential mischief of judges acting as juries.

In accepting *Matsushita*, *Liberty Lobby*, and *Catrett* for review, the Court could have legitimately clarified rule 56 by discussing these three strands of federal summary judgment practice, articulating its preferred view, and giving guidance to lower courts through approving citation of the preferred earlier cases. Instead, the Court announced a summary judgment standard that went well beyond even the most favorable previous prong by seeing rule 56 as the “mirror” of directed verdict rather than as merely informed by rule 50. Coupled with the additional rhetoric and the questionable pro-defendant outcomes in all three cases, the Court effectively rewrote rule 56 to create a summary judgment doctrine that went beyond what even the reformers had urged.

3. *The Real Directed Verdict: Another Case of Multiple Personality*

Had the Court stopped at merely equating the directed verdict and summary judgment standards, this result would have been divergent and detrimental enough. In my view, however, the Court did more by also implicitly changing the directed verdict doctrine to permit judges more fact-weighting freedom than they formerly held. Generalizing about directed verdict practice in federal courts is nearly as dangerous as generalizing about the application of rule 56. With this caveat given, however, it appears that the consensus was that the judge, in determining whether a reasonable jury might find for the nonmovant, did not actually characterize the worth of the nonmovant’s evidence but rather juxtaposed the nonmovant’s favorable and unfavorable evidence with that of the movant to determine whether the nonmovant had at least some unvitiated material before the court to support each element of the nonmovant’s claim.³²³ A nonmovant’s evidence was considered vitiated and there-

civil rights, securities, antitrust, tax, and other cases involving a statutory remedy or right to relief in which 50.2% of the motions made were granted).

McLauchlan found that summary judgment was granted 73.9% of the time in real property cases, a surprising and counterintuitive 66.9% of the time in tort actions, and 63.2% of the time in contract actions. *Id.* at 437. Because the “statutory” cases were the plurality of the sample, the overall average for summary judgment was near 50% in terms of affirmed summary judgment grants. However, within the statutory group, summary judgment was granted in a substantial portion of the antitrust cases. *Id.* at 439.

Defendants moved for summary judgment three times as often as plaintiffs (*id.* at 442) and “won 70.0 per cent outright and 73.9 per cent total of their efforts at summary disposition.” *Id.* at 441. When the parties stipulated to the relevant facts, summary judgment was granted 90% of the time. *Id.* at 442. Furthermore, the litigants apparently made relatively little use of discovery materials to support or oppose summary judgment, relying primarily on the pleadings and affidavits. Twenty percent of the cases involved consideration of summary judgment without any listed supporting materials. *Id.* at 446–47. McLauchlan’s use of reported cases as his data sample may have given an inaccurate impression in this regard if, as I suspect, the courts’ opinions often opt not to painstakingly list the items of record upon which they decide to grant summary judgment.

This data and the other interesting tidbits of information unearthed by McLauchlan present the picture of a summary judgment rule that seems to work pretty well when used and certainly works better and more often for defendants, suggesting that meritless claims are screened by the motion. Despite the finding, which I question, of its infrequent use, this empirical work hardly supports the Court’s assumption that something is sufficiently wrong with federal summary judgment practice—particularly middle prong cases—to warrant a sharp turn in rule 56 doctrine. Similarly, this empirical data does not support the current Advisory Committee plans to alter rules 12, 40, 50, and 56. *See infra* text accompanying notes 433–50.

323. According to Professor Wright concerning the question of what matter the court may consider in ruling on the directed verdict motion:

fore not sufficient to support a jury verdict in nonmovant's favor when it was contradicted by his or her other evidence, or when it was inadmissible, clearly fabricated, or (occasionally) when it was so at odds with laws of nature or the overwhelming weight of other evidence in the record.³²⁴ Only in this last instance was the judge who granted a directed verdict motion arguably evaluating facts, inferences, or theories to the extent of the *Matsushita* or *Liberty Lobby* Courts. In actual practice as well, the judges applying directed verdict before 1986 seemed to find claims backed by some nonmovant evidence as insufficiently probative only in extreme cases.³²⁵

In addition, there was a tripartite division of opinion in directed verdict doctrine as well. At one prong, some courts took a view of directed verdict decidedly different from that of the *Matsushita* and *Liberty Lobby* Courts, stating that in ruling on the motion, they could consider only the evidence favorable to the nonmovant.³²⁶ Courts at the opposite prong took a view closer to the 1986 Supreme Court and considered all of the evidence of record in ruling on the motion in order to decide whether a reasonable jury might find for the nonmovant.³²⁷ In the middle were the largest number of courts taking what commentators construed as the correct view—that the court should consider all uncontradicted evidence in ruling on the motion, even if it favored the movant rather than the nonmovant, but that when there was conflicting evidence, the nonmovant's version of the evidence should be accepted as true and that all reasonable inferences from the record should be drawn in favor of the nonmovant. In addition, a nonmovant's testimonial evidence had to be deemed credible unless directly and conclusively contradicted or impeached.³²⁸

This most widely accepted directed verdict procedure is quite distinct from the 1986 Court's implicit approach of viewing and assessing all of the evidence, and then

The correct rule seems to be that the court may consider all of the evidence favorable to the position of the party opposing the motion as well as any unfavorable evidence that the jury is required to believe. Thus it may take into account evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that this evidence comes from disinterested witnesses.

WRIGHT, *supra* note 17, at 642 (citing *Simblest v. Maynard*, 427 F.2d 1, 5 (2d Cir. 1970); *Negron v. Ward*, 458 F. Supp. 748, 756 (S.D.N.Y. 1978); Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 948–53 (1971); and 9 WRIGHT & MILLER, *supra* note 15, § 2529).

324. A fair reading between the lines of the majority of pre-*Liberty Lobby* cases seems to me to suggest that the courts considered a nonmovant's evidence in opposition to a summary judgment or a directed verdict motion vitiated where the evidence was contradicted by other statements made by the nonmovant or its obvious allies. Thus, when a nonmovant submitted an affidavit containing admissible evidence in opposition to a summary judgment motion but the affidavit was contradicted by the nonmovant's own deposition testimony, summary judgment was proper without any need to evaluate the probative value of the affidavit evidence. See *Camfield Tires, Inc. v. Michelin Tire Co.*, 719 F.2d 1361 (8th Cir. 1983). Nonmovant evidence was also vitiated *ab initio* when it was contradicted by external sources so accurate and authoritative as to be beyond question. Nonmovant evidence at odds with the laws of nature was also vitiated and unavailable to create a genuine issue of material fact. See JAMES & HAZARD, *supra* note 11, at § 5.19.

325. See James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961).

326. See *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949); WRIGHT, *supra* note 17, at 642.

327. See WRIGHT, *supra* note 17, at 641.

328. See WRIGHT, *supra* note 17, at 642. In deciding directed verdict or judgment notwithstanding the verdict motions, courts had often suggested that questions of interpretation are almost always questions of fact for the jury (see, e.g., *Dobson v. Masonite Corp.*, 359 F.2d 921, 925 (5th Cir. 1966)) and discussed whether the evidence was "one-sided" against the nonmovant only when deciding new trial motions (see, e.g., *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350 (4th Cir. 1941)).

making credibility or plausibility inferences in favor of the movant when a majority of the justices agree with the movant. The inevitable conclusion is that the Court not only strengthened summary judgment but also strengthened directed verdict as well by permitting a good deal of judicial evaluation of both fact existence and fact interpretation disputes. This combination of explicit and implicit rewriting of the Federal Rules and rhetorical flourishes praising pretrial elimination of claims brings a pronounced shift to federal civil litigation practice as well as to the previous balance of power between claimants and defendants.

III. THE FUTURE PERILS OF *LIBERTY LOBBY* AND *MATSUSHITA*

Despite the Court's posture of merely enunciating the status quo in *Liberty Lobby*, its holding, dicta, and implicit thrust have already shifted the balance of power in summary judgment adjudication. Although the profession has yet to appreciate the full ramifications of *Liberty Lobby*, some lawyers have already grasped the decision as a new pretrial weapon and found judges receptive to the greater force given summary judgment by the Court. Some courts have expressly acknowledged that *Liberty Lobby* at least shifted the summary judgment equation.³²⁹ Others have treated the case as the Court majority did, as only an exposition of the obvious, but have used *Liberty Lobby* to grant summary judgment in cases in which their prior controlling precedents would seem to counsel against it.³³⁰ These courts have received the less express message of the Court majority to begin granting summary judgment more frequently to trim weak or otherwise disfavored cases from the trial docket. The observed and coming change in summary judgment jurisprudence bodes ill for certain classes of litigants, persons interested in the accuracy of judicial decision making, and the system as a whole.

A. *A Change in Procedure as a Shift in the Relative Power of the Litigants*

Although it began in England as a tool to provide judgments without trial in aid of debt collection, summary judgment under the American Federal Rules has long been viewed as a tool of defendants rather than plaintiffs. Unfortunately, there is less empirical data in this area than one would prefer. However, the available data tend to confirm the conventional wisdom. Three-fourths of summary judgment motions are brought by defendants.³³¹ Defendants' summary judgment motions are granted much more often than those of plaintiffs.³³²

As various sources have noted, appellate courts usually affirm trial court grants of summary judgment. Because the circuit courts are often satisfied with the pretrial grant of summary judgment, most of these affirmances have been without opinion.³³³

329. See *supra* note 76.

330. See, e.g., *Michelson v. Exxon Research & Eng'g Co.*, 808 F.2d 1005 (3d Cir. 1987); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1570 (1987).

331. *McLauchlan*, *supra* note 322, at 429.

332. *Id.* at 442.

333. See Final Report of the Second Circuit Committee on Civil Litigation, 115 F.R.D. 260, 262-63 (1987);

As a rule, the circuit courts are compelled to write at length in reviewing a summary judgment question only when they are reversing the district court. Consequently, some of the most prominent summary judgment cases are reversals, many containing language that might suggest hesitancy to grant summary judgment, a phenomenon criticized by courts and commentators³³⁴ as creating some reluctance to employ and grant the motion in trial judges and counsel.

However, this effect has probably been overstated. Trial judges and attorneys, of course, read the published circuit opinions with care. They also undoubtedly know their own track records. Trial judges and lawyers must have known that summary judgment was not as disfavored as some case language might have suggested, since their own motions for and grants of summary judgment were doing well. Nonetheless, the professional myth or "cosmic anecdote" has long held that summary judgment was difficult to obtain because almost any nonmovant's lawyer could create some small dispute over some material fact in the litigation.³³⁵ According to the available empirical evidence, that myth, just like many of the presumed "facts" underlying the "litigation explosion" myth, was wrong.

Prior to *Liberty Lobby*, rule 56 had sufficient teeth to it that it was used frequently and often. This use primarily favored defendants. Inevitably, *Liberty Lobby* has shifted the equities and impact of rule 56 even more strongly in favor of defendants. My question is "Why?" Why take an already effective pro-defendant rule of civil procedure and make it strikingly more pro-defendant? Did the Supreme Court have any evidence that defendants were losing at the hands of unreasonable juries cases that reasonable judges would have snuffed out before trial if only the judges had authority under rule 56 to deem the nonmovant's existent but weak facts insufficient to propel the matter forward? No such evidence appears in *Matsushita*, *Liberty Lobby*, *Catrett*, or legal literature generally. Quite to the contrary, most data suggests that the presumably "reasonable" judges who will administer the expanded rule 56 created by *Liberty Lobby* usually agree with the findings made by juries.³³⁶ For example, one recent survey found that most trial judges disagreed with the jury verdicts in cases before them less than ten percent of the time.³³⁷ The same survey also found that judges seldom find jury verdicts to be excessive.³³⁸

Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1983).

334. See, e.g., *Michelson v. Exxon Research & Eng'g Co.*, 808 F.2d 1005 (3d Cir. 1987); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), *cert denied*, 107 S. Ct. 1570 (1987).

335. See Bracht, *Has Summary Judgment Been Eliminated in the Second Circuit?*, 46 BROOKLYN L. REV. 565 (1980) (arguing that despite well-known cases such as *Arnstein v. Porter*, vast majority of Second Circuit opinions and results are receptive to grants of summary judgment). The view that summary judgment was difficult to obtain, even if incorrect, tends to confirm that the profession viewed the summary judgment and directed verdict standards as different, that summary judgment could be defeated by fact issues that might not prevent a directed verdict.

336. See V. HANS & N. VIDMAR, *JUDGING THE JURY* 50, 156, 245 (1986) (noting differences in perception and evaluation between individual jurors as well as between juries and judges) [hereinafter HANS & VIDMAR]; R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* 39-82 (1983) [hereinafter HASTIE]; H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 55-81 (1966) [hereinafter KALVEN & ZEISEL].

337. See Rosen, *The View From The Bench*, NAT'L L.J. (August 10, 1987) at S-8, col. 1 [hereinafter Survey].

338. *Id.*

Furthermore, even if empirical data revealed a larger percentage of claimants' verdicts based on weak evidence that would not have prevented summary judgment under the *Liberty Lobby* and *Matsushita* standards, the existing devices of directed verdict, judgment n.o.v., and new trial were readily available to prevent or erase the verdict and see justice done for the defendant. If, then, a substantial number of juries were acting unreasonably, an increase in rule 50(a), rule 50(b), and rule 59 motions should reflect this. Again, comprehensive empirical data is absent. At a minimum, however, there appears to be no such relative upsurge in successful use of these motions.³³⁹ If there were, this would tend to indicate perhaps too many meritless claims proceeding through trial.

In other words, my rhetorical question to the Court is: "What was so broken about rule 56 that it had to be 'fixed' by turning it into a stronger rule 50(a)?" My own answer is nothing, at least nothing that was properly in the record upon which the Court could base its revisionist action. Even those who find the *Liberty Lobby* opinion not to be radical must acknowledge that it is political.³⁴⁰ By making summary judgment easier to obtain, the Court implicitly bestowed a political favor (and greater judicial power) on litigants who can make most use of the motion. Defendants use the motion more than plaintiffs. Defendants are disproportionately comprised of society's "haves": banks, insurance companies, railroads, business organizations, governments, and government agencies.³⁴¹ Plaintiffs are disproportionately comprised of society's "have nots": individuals, business sole proprietorships, and smaller entities.³⁴² Although these are rough categories, they have meaning as organizational

339. See McLauchlan, *An Empirical Study of Civil Procedure: Directed Verdicts and Judgments Notwithstanding Verdict*, 2 J. LEGAL STUD. 459 (1973). In this study of approximately 2,000 reported cases, Professor McLauchlan concluded that the "Rule 50 shortcut mechanism is commonly not allowed to operate." *Id.* at 468. His data, however, suggest that trial courts grant directed verdict motions approximately two-thirds of the time and that half of these grants are affirmed on appeal. *Id.* at 464-65. Defendant corporations are the most frequent movants. *Id.* at 465. McLauchlan's data, then, suggest that the directed verdict, even under the pre-*Liberty Lobby* "mild" doctrine, was not so flaccid as to require major overhaul.

340. By "political," I do not mean "overtly partisan" or "intending to aid a particular organized interest or party." Rather, I define as political those rules or systems that act to affect in a significant manner the distribution of social welfare and power in society. Viewed this way, the federal court system and its rules are inherently political, not a shocking assertion in light of the federal judiciary's status as a co-equal political branch of the national government. In narrower fashion, a given federal rule of civil procedure has political overtones to the extent that it operates to the net advantage of some definable segments of society and to the disadvantage of others. All rules are probably inherently political. However, alteration of a rule in favor of certain classes of litigants, as occurred in *Matsushita* and *Liberty Lobby*, is obviously political. In addition, a shift in decision making authority from juries to judges can have more partisan or obvious political impact depending upon the judge's political/judicial philosophy and its divergence from that of the jury. See Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987) (empirical study of reported cases finds patterns of voting for or against particular claims, litigants depending on whether judge was appointed by Republican or Democratic president).

341. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y REV. 95 (1974) [hereinafter *Haves*]; Wheeler, Cartwright, Kagan & Friedman, *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 L. & Soc'y REV. 403 (1987) [hereinafter Wheeler]. "Haves" as the term is used in Professor Galanter's article and in most literature on the topic are those parties to litigation who are relatively wealthy, organized, knowledgeable, and experienced in litigation. The paradigmatic haves are large business or government organizations with lots of money, experience, and access to legal resources.

342. See *Haves*, *supra* note 341, at 97-98; Wheeler, *supra* note 341, at 412-15.

constructs and are supported by the available empirical data³⁴³ as well as theory³⁴⁴ and “common sense.”

This is not to suggest that have noters deserve to win more than do havees. My point is only that a rule that makes it easier for havees to succeed by a pretrial motion works to the aggregate advantage of some groups and to the disadvantage of others, irrespective of the merits of their claims. Since rules of procedure are, insofar as possible, supposed to be neutral in their impact on litigants, a change in any procedural rule should be justified by evidence that the rule needs to be changed to correct an unfair imbalance or that a current neutral balance is unwise. No such case was made prior to the *Liberty Lobby* holding. Defendants and the constituent groups comprising defendants appear to have been doing quite well under the old rule 56.

B. *A Change in the Role and Authority of the Civil Jury*

The negative Realpolitik of the *Liberty Lobby* decision is exacerbated both by the way the change was effected and by the decision's shift of power from juries to judges in derogation of the seventh amendment. If the Court had acknowledged that a merger of the directed verdict and summary judgment standards constituted a change in rule 56 and determined to approach this change through the amendment process established under the Enabling Act, the groups affected by the change in rule 56 would have possessed far greater opportunity to register support, opposition, or specific suggestions. Most important, from the perspective of a civil rule's allocation of power among litigants, the have noters could at least have been given a forum for argument through suggestions to the Advisory Committee and lobbying efforts in Congress.³⁴⁵ As the change in rule 56 unfolded in *Liberty Lobby*, the have noters were essentially “represented” only by a right-wing libel plaintiff and Justice Brennan *sua sponte*.

The seventh amendment provides that the right to jury trial shall be preserved.³⁴⁶ Traditionally, the Court has taken a historical approach to the amendment,³⁴⁷ combined with elements of a functional approach as well.³⁴⁸ If the claim presented in a case or its historical analogue was one “at law” in 1791 a jury is generally available to the claimant as of right.³⁴⁹ If the claim or its historical cousin was one “in equity” in 1791, a jury trial is not required under the seventh amendment,³⁵⁰ although the judge may impanel an advisory jury.³⁵¹ When the claim and relief sought mingle what

343. See *supra* note 342.

344. See *Haves*, *supra* note 341, at 98–100.

345. For example, the American Trial Lawyers' Association, comprised largely of plaintiffs' personal injury lawyers, is reputed to have considerable lobbying clout with Congress, due in substantial part to the grassroots contacts of its membership. By contrast, this group has relatively little clout with the elite business law and law school establishment that tends to dominate the Advisory Committee process.

346. U.S. CONST. amend. VII.

347. See JAMES & HAZARD, *supra* note 11, at § 8.2; WRIGHT, *supra* note 17, § 92, at 612.

348. See JAMES & HAZARD, *supra* note 11, at §§ 8.3, 8.11; WRIGHT, *supra* note 17, § 92, at 612; Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 HASTINGS L.J. 1 (1975).

349. See *Tull v. United States*, 107 S. Ct. 1831, 1835 (1987).

350. *Id.*

351. See FED. R. CIV. P. 39(c) (“In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury. . . .”).

was historically legal and equitable, a frequent consequence of the merger by the civil rules of law and equity in the federal courts, the claimant ordinarily has a jury trial right at least as to the legal or "legalesque" aspects of the case so long as providing a jury trial is not impractical or does not vitiate the essential character of the action.³⁵² Since the Court's noted 1959 decision, *Beacon Theatres v. Westover*,³⁵³ the federal courts have generally shown a preference for granting a jury trial in close or doubtful situations.³⁵⁴ To some extent, *Liberty Lobby*, *Matsushita*, and *Catrell* mark a departure from that line of cases and perhaps the end of an era in seventh amendment jurisprudence.

As previously discussed, prior to *Liberty Lobby*, judges possessed more authority to remove a case from the jury when facing a directed verdict motion than they did when deciding a summary judgment question. In deciding summary judgment motions, the judge was constrained to deny the motion only when there were nonfrivolous differing versions of material fact or when key material facts were subject to different interpretation by the factfinder. In ruling on a directed verdict motion, the judge in practice had greater latitude and could eliminate a claim or case supported by nonfrivolous factual assertions or interpretations that the judge concluded were nonetheless insufficient to convince a reasonable jury to find for the nonmovant.

The rule 50(a) test, especially as formulated in *Liberty Lobby*, allows more bench intrusion into the jury's role, suggesting possible seventh amendment difficulty since the judge deciding a directed verdict motion is weighing facts and assessing their ultimate persuasive value, conduct suspiciously akin to the jury's exclusive province in cases at law pursuant to the seventh amendment. The summary judgment inquiry, at least prior to *Liberty Lobby*, was directed toward merely ascertaining whether there existed disputed or multi-interpretable facts for the jury to evaluate.

Taken together and read in context, the precedents sustaining devices for terminating a case before verdict or overturning a verdict³⁵⁵ rest essentially on the

352. See WRIGHT, *supra* note 17, at § 92.

353. 359 U.S. 500 (1959).

354. See, e.g., *Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); JAMES & HAZARD, *supra* note 11, at §§ 8.2-8.5; WRIGHT, *supra* note 17, at § 92. But see *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977) (jury trial not available against government enforcement of "public rights" created after 1791 with no strong historical analogue); *Katchen v. Landy*, 382 U.S. 323 (1966) (jury trial not available in bankruptcy proceedings).

355. In *Galloway v. United States*, 319 U.S. 372 (1943), the Court held that a grant of directed verdict did not violate the seventh amendment. In *Galloway*, the suit was against the government, which was protected from adverse jury verdicts by sovereign immunity in 1791. The directed verdict was constitutional in all civil cases according to the Court both because there appeared to be a similar procedure for cases at law in England and some colonies prior to 1791 and because the right to a jury trial only attached when there existed in a case at law fact questions requiring the assessment of a reasonable factfinder. *Id.* at 388-93. If the trial judge did not see in the record sufficient evidence to support a claimant's verdict, then it followed that there were presented at trial no fact disputes that required jury consideration and invoked the seventh amendment.

In a vigorous dissent joined by Justices Douglas and Murphy, Justice Black attacked the result as an unconstitutional intrusion upon the jury's power to weigh evidence. *Id.* at 396 (Black, J., dissenting). To Justice Black's historical analysis, the framers intended that only the motion for a new trial be available to set aside a jury verdict.

Id. (Rule 59 empowers the court to order a new trial when the judge finds the verdict to be against the weight of the evidence, or excessive, or produced by improper influences. See WRIGHT, *supra* note 17, at § 95. The court may also condition the grant of a new trial upon remittitur, in effect telling the verdict winner that a new trial will be ordered if the

following rationale: when one party has no, or next-to-no, material evidence to support its claims, the judge may rule against those claims without violating the seventh amendment because the absence of such material evidence leaves no acceptable task for the jury. In other words, there is then no legally legitimate fact conflict for the jury to resolve or fact inference for the jury to draw. When the nature of summary judgment and directed verdict (and by extension judgment n.o.v.) practice is changed, however, so that it involves a judicial assessment of the correctness of competing questions of fact existence and fact inference, the rock on which these cases was built begins to crumble. If the judge is making evaluations of fact, the judge is therefore engaging in conduct that was traditionally regarded as a jury function. When this occurs in "cases at law," however that phrase is defined,

winner does not accept the lower verdict seen by the court as reasonable. These powers are substantial and enable courts to eliminate "bad" jury verdicts, at least until the court tires of ordering retrials. Justice Black argued that this was ample legitimate control over juries and that the seventh amendment precluded anything stronger, including the judgment n.o.v. motion. His views, although not accepted by a Court majority, have ample logic in their support. If the verdict exceeds the bounds of reasonableness, the court can eliminate it with a new trial order rather than a complete reversal of fortune. If a second or third jury continues to give a certain verdict, perhaps the court should accept the verdict as reasonable, unless the court is prepared to indict its own jury selection procedures.) On a functional level, Justice Black viewed the new trial motion as consistent with the role of the jury in modern litigation since the motion if granted did not ultimately deprive the litigant of jury consideration but only of the benefits of a verdict reached after unfair proceedings or rendered against the clear weight of the evidence. *Galloway v. United States*, 319 U.S. 372, 405 (1943) (Black, J., dissenting). The dissent found particularly pernicious a court's ability to grant a directed verdict or judgment n.o.v. in the face of conceded evidence favoring the verdict winner but to deem that evidence insufficiently "substantial" to support the verdict. *Id.* at 407.

The directed verdict was held constitutional in *Parks v. Ross*, 52 U.S. (11 How.) 362 (1850). There, the Court found the procedure not to violate the seventh amendment when there was no evidence to sustain the verdict favoring the nonmovant. *Id.* at 372-73. In *Schuykill and Dauphin Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442 (1871), the Court approved of a directed verdict when the evidence offered by the nonmovant was too insubstantial to support a reasonable jury's verdict in its favor. *Id.* at 447-48. The Court construed the seventh amendment to convey a claimant's right to only a reasonable jury's consideration; thus, the claimant lacking enough evidence to convince the reasonable jury was not entitled to deliberation. *Id.* The *Galloway* dissent criticized this development as an unconstitutional erosion of the right to jury trial in that it permitted too much judicial weighing of the evidence, a function supposedly committed to the jury by the seventh amendment, in the course of determining the "substantiality" of the nonmovant's evidence. *Galloway v. United States*, 319 U.S. 372, 407 (1943) (Black, J., dissenting). Justice Black also criticized the more recent case of *Gunning v. Cooley*, 281 U.S. 90 (1930), which stated that the judge might grant a directed verdict when, after balancing the evidence offered by movant and nonmovant, the judge determined it was in the "overwhelming" favor of the movant.

The grant of a new trial has been easily sustained against constitutional attack, with *Aetna Casualty & Surety Co. v. Yeats*, 122 F.2d 350 (4th Cir. 1941), perhaps the most cited case. Unlike the cases upholding the directed verdict and judgment n.o.v. motions, there was no dispute that the grant of a new trial when the verdict is against the clear weight of the evidence does not violate the seventh amendment. Like Justice Black, the *Yeats* Court also found historical authority for the new trial and concluded that a grant of the motion can eliminate not only a tainted verdict but also permit the nonmovant ultimately to obtain jury consideration of its claims. When the new trial motion is based on the weight of the evidence, the judge is admittedly assessing facts and acting within the supposed realm of the jury. Nonetheless, courts have found this consistent with the jury's status as of 1791, a result with which even Justice Black, a staunch proponent of the jury, agreed.

The challenge to the summary judgment rule presented in *Fidelity & Deposit Co. of Maryland v. U.S. to Use of Smoot*, 187 U.S. 315 (1902), was easily disposed of by a sizable Court majority. The Court held that a jury was not required in a situation in which a grant of summary judgment was appropriate because this absence of genuine dispute of material fact meant that there were no facts in conflict to be evaluated or weighed by a jury; the facts were conclusively established on the record. *Id.* at 320. See also *WRIGHT, MILLER & KANE, supra* note 17, at § 2714. This view is both conceptually cleaner and has been less subject to criticism than the rationale upholding the "substantial evidence" directed verdict and judgment n.o.v. in that it permits no judicial assessment of the probative worth of the nonmovant's facts. Instead, the judge checks merely to see if the material facts are at odds or if more than one inference is possible from undisputed facts. When this is so, the summary judgment was traditionally denied, preventing any close question of the judge's assumption of traditional jury functions.

it would seem that these new summary judgment, directed verdict, and judgment n.o.v. ground rules violate the seventh amendment.

In addition to posing substantial problems of constitutional doctrine, *Liberty Lobby* and *Matsushita* would seem to affect the merits of litigation outcomes as well. Most studies of judge and jury disagreement, in both civil and criminal cases, have suggested that jury determinations are not that different from those made by a judge but that there is a significant amount of divergence.³⁵⁶ Most scholars suggest that, at a minimum, the process by which jurors reach conclusions differs from that of judges³⁵⁷ and that the jury introduces elements of flexibility and equity in the application of otherwise rigid rules of law.³⁵⁸ Logically, this must mean that the Court's recent revision of summary judgment (and by implication directed verdict and judgment n.o.v.) entails the potential for a substantial shift in substantive law and a major redistribution of political and judicial power between the bench and the laity. Generally, the jury is regarded as exercising its powers of flexibility, equity, and nullification in favor of plaintiffs.³⁵⁹ If that adage is correct, *Liberty Lobby* and *Matsushita* are then clearly pro-defendant and anti-plaintiff decisions.³⁶⁰

This assumption, however, is open to question. One study has found that the average judge's concept of proof sufficient to constitute persuasion by a preponder-

356. See HANS & VIDMAR, *supra* note 336, at 245; HASTIE, *supra* note 336, at 40-65; KALVEN & ZEISEL, *supra* note 336, at 59-82. Most authorities have concluded that jury determinations of both fact existence and fact inference differ in some respect from judicial determinations. At a minimum, the process by which jurors reach conclusions differs from that of judges. See HARPER, JAMES & GRAY, *supra* note 94, at § 15.5; J. FRANK, *COURTS ON TRIAL* (1949); L. GREEN, *JUDGE AND JURY* (1930); C. JOINER, *CIVIL JUSTICE AND THE JURY* (1962); Kalven, *The Jury, The Law and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958); MARSTON, *Is the Jury Ever Right?*, 9 FLA. L.J. 554 (1935).

357. HASTIE, *supra* note 336, at 83-120; KALVEN & ZEISEL, *supra* note 336, at 182-305.

358. As Oliver Wendell Holmes put it, jurors "will introduce into their verdict a certain amount—a very large amount so far as I have observed—of popular prejudice, and keep the administration of the law in accord with the wishes and feelings of the community." O. HOLMES, *COLLECTED LEGAL PAPERS* 237 (1921). Put more charitably, the jury introduces elements of flexibility and equity in the application of otherwise perhaps rigid rules of law. See Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 56-59 (1977); Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1066 (1964); but see HANS & VIDMAR, *supra* note 336, at 156, 245 (although perhaps differing in perception from judge, jurors appear to follow judge's instructions and are not incompetent, prejudiced, or at war with disfavored legal rules). See also G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 57 (1978) (jury can in private make decisions not easily debated in public because of charged political, social, moral, religious content of choice or because all options entail consequences that society as a whole is hesitant to acknowledge).

359. See HARPER, JAMES & GRAY, *supra* note 94, § 15.5, at 374-76; Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476, 476 n.1 (1936). One might also logically posit that juries are also more favorably disposed to find plausible plaintiff's theories of the case or claimed inferences in cases involving judicially disfavored causes of action such as antitrust and shareholders' derivative suits. According to Harper, James, and Gray, "[a]ny rule of substantive law or procedure that enlarges the jury's theoretical sphere tends to extend liability, and conversely any rule that restricts the jury's sphere tends to restrict liability." HARPER, JAMES & GRAY, *supra* note 94, § 15.5, at 379.

360. This Article does not suggest that expansive liability rules are automatically preferable to restrictive liability rules or that jury determinations are superior to those of judges. Rather, this Article sets forth the proposition that recent changes in summary judgment and directed verdict jurisprudence effect a significant change in substantive law, the role of the jury, and the relative balance of power between litigants. These sorts of legal changes are of sufficient magnitude to merit legislative involvement rather than judicial policymaking in the guise of interpreting a procedural rule. Limitations on liability and restrictions of claims should, for the most part, proceed by substantive legislation rather than judicial decision. I also note that some authors have suggested that the civil jury is only a pseudo-democratic device and is in fact a smokescreen for oppression of the masses by a judicial and business elite. See, e.g., R. KIDDER, *CONNECTING LAW & SOCIETY* (1983); W.J. CHAMBLISS & R.B. SEDMAN, *LAW, ORDER & POWER* (1971). This critique is beyond the scope of this Article which presumes, correctly I think, that civil juries do in fact reduce any hierarchical ordering of judicial, economic, or political power in the nation.

ance of the evidence is an assessment that fifty-five percent of the proof favors the plaintiff. The average juror finds the preponderance threshold met only when it is seventy-five percent likely that the claimant's version of events is true.³⁶¹ If this is correct, one can argue that juries have historically and intrinsically required claimants to prove their cases by clear and convincing evidence even when the law requires only that they prove them by a mere preponderance, hardly an unduly pro-plaintiff approach to rendering a verdict. Of course, there is in a sense no such thing as an average judge or juror. Surveys of the bench show that judges differ substantially in their notions, expressed as a percentage of probability, of what constitutes proof by clear and convincing evidence and even what constitutes proof beyond a reasonable doubt.³⁶² Under these circumstances, the notion that vesting greater fact assessment power in the bench will bring more consistent judgments seems open to a good deal of question.

Regardless of whether jury decisions differ from those of judges, the jury determinations of fact existence and fact inference serve other values as well: the infusion of community standards into litigation; promoting public confidence in the judicial system and fairness of litigation results; maintaining democratic values of participation; and citizen access to the system.³⁶³ All of these traits enhance the legitimacy of unelected article III courts. Revised rules of summary judgment, directed verdict, and judgment n.o.v. that reduce jury participation undermine these values and consequently diminish the system as a whole.

Under *Liberty Lobby*, the judge now has greater license to eliminate the jury prior to trial. Previously, the judge had to wait until at least mid-trial before her excursion into what many regarded as jury territory could begin. By deciding, before full development of the record at trial, that the nonmovant's side of a disputed factual story is not sufficiently probative to support a verdict by a reasonable jury, the judge can more easily eliminate not only claims that she finds unpersuasive in the instant case but also legal rights with which she is unsympathetic. Although delineating the unreasonable claim from that which is merely unpersuasive can become something of a philosophical exercise, there is a difference.³⁶⁴ Any individual can reject a given assertion and be quite convinced that his or her conclusion is absolutely correct. This

361. See R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967); O'Connell, *Jury Trials in Civil Cases*, 58 ILL. B.J. 796 (1970); Simon & Mahan, *Quantifying Burdens of Proof*, 5 LAW & SOC. REV. 319 (1971).

362. See *United States v. Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978) (survey of judges of Eastern District of New York bench finds judges' percentage assessment of what constitutes clear and convincing evidence to vary from 60 to 75% and also finds variance in percentage notion of what constitutes proof beyond a reasonable doubt); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1311 (1977) (finding variance among judges of between 80 and 100% as to reasonable doubt standard and between 50.1 and 75% for preponderance of the evidence standard).

363. See Clark, *The American Jury: A Justification*, 1 VAL. U.L. REV. 1 (1966); Higginbotham, *supra* note 358, at 53; Kalven, *supra* note 358; Project, *With Love in Their Hearts But Reform on Their Minds: How Trial Judges View the Civil Jury*, 4 COLUM. J.L. & SOC. PROBS. 178 (1968); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979).

364. As the late Justice Potter Stewart said in terms of defining pornography, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Stewart, J., concurring). In similar fashion, I suggest that persons hearing matter with which they disagree distinguish between arguments they find unpersuasive and those deemed unreasonable or ludicrous.

feeling of certainty does not, of course, cast the assertion irretrievably into the outer darkness of the "unreasonable."

The trial judge's power under *Liberty Lobby* includes not only authority to find insufficiently convincing nonmovant evidence in a particular case but also power to covertly enter judgment against particular litigants or claims that the judge disfavors. Although this could also occur under the traditional rule 56 approach, it will occur more often after *Liberty Lobby*, especially when the judicial hostility to a party or claim is subconscious rather than overt, and it will be harder to correct through appellate review. Presumably, the trial judge's determination that given facts lack sufficient probative value will be subject to de novo review rather than the "clearly erroneous" test upon review.³⁶⁵ The net effect of *Liberty Lobby* nonetheless permits judges to reduce the role of juries and to more easily substitute their conclusions for those of the juries. This can occur both by chance and design. Appellate correction of errors made under the *Liberty Lobby* standard will also be more difficult because of the de facto deference given to trial courts, even when the standard of review is plenary.³⁶⁶ The composition of the bench suggests that the new, fact evaluation summary judgment could be both arbitrary and directional in its impact. Judges are disproportionately drawn from upper middle class backgrounds,³⁶⁷ and also disproportionately white, male, and Protestant.³⁶⁸ In a recent survey, they described themselves as more conservative than liberal.³⁶⁹ This demographic aspect of the bench also carries political impact. By comparison, the juries in most jurisdictions are more representative of working class, minority, female, and liberal components of American society.³⁷⁰ To the extent that judges have more opportunity to influence results since *Liberty Lobby*, it is not unreasonable to expect over time that the results will please the upper middle class, men, whites, Protestants, and conservatives more than they did prior to *Liberty Lobby*. A change in the rules with this potential for shifting judicial political power should only occur under the more open and participatory procedures established under the Enabling Act.

365. Trial judges' determinations of fact are generally reviewed only to determine if they were "clearly erroneous" rather than completely correct or wise. A district court's fact determination is clearly erroneous when the reviewing court, after viewing the record as a whole, is left with the definite and firm impression that a mistake has been made. *See United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).

However, in ruling on a summary judgment motion, the trial court is said to have made a determination upon a mixed question of law and fact or upon a pure question of law. Both are generally subject to plenary appellate review, with no deference given to the trial court decision. *See Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620 (8th Cir. 1981); *Silverstein v. United States*, 419 F.2d 999 (7th Cir. 1969), *cert. denied*, 397 U.S. 1041 (1970). Proposed Amended Federal Rule of Civil Procedure 40(b) would treat pretrial determinations of fact as subject to plenary appellate review. Although this approach would reduce the risk of district court error, it does not alleviate the evils of a *Liberty Lobby* approach to summary judgment and would increase the risk of appellate court dismissal of disfavored claims, as occurred in *Matsushita* and *Liberty Lobby*.

366. *See Wheeler, supra* note 341, at 437-38 (most appeals—60%—unsuccessful in large survey of state supreme court decisions).

367. *See H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS* 113-15 (1972) [hereinafter CHASE]; J. SCHMIDHAUSER, *JUDGES AND JUSTICES: THE FEDERAL APPELLATE JUDICIARY* 50-104 (1979) [hereinafter SCHMIDHAUSER].

368. *See Survey, supra* note 337, at S-18.

369. *See id.*

370. *See HANS & VIDMAR, supra* note 336, at 53, 81; *HASTIE, supra* note 336, at 106-08, 129-53; *KALVEN & ZEISEL, supra* note 336, at 70-85.

Matsushita, unless it proves to be the Court's sui generis means of disposing of a big and troublesome case, holds as much potential as *Liberty Lobby* for permitting judges to make deep incursions into adjudicatory territory formerly reserved to the jury. The majority's holding in *Matsushita* essentially was a declaration that certain allegations of defendant behavior and motivation could be rejected by the trial court as a matter of law prior to trial. The unusual, "hard case" status of *Matsushita* and the narrow, five-four decision marked by a strong dissent suggest caution in reading *Matsushita* as a case with likely widespread ripple effect.³⁷¹ If, however, *Matsushita* can be taken for what it said and is read with *Liberty Lobby*, trial judges now have Supreme Court approval power to weigh and judge a nonmovant's facts as present but insufficient to persuade reasonable jurors. When this does not permit the judge to throw out the case, he or she may then examine the allegations made by claimant upon this admittedly conflicting record and deem the allegations and claimant's interpretation of defendant's conduct "implausible." A resourceful judge who wants to trim a difficult, time-consuming, distracting, or perceptibly weak case from her docket now has all the tools to do it. Even when the appellate court finds the district court has gone too far in excluding evidence or theories of the case, as occurred in *Matsushita* before the Third Circuit, there remains the possibility of review before those devotees of summary judgment, the United States Supreme Court.

This expanding definition of what constitutes a question of law (as opposed to a question of fact) found in *Matsushita* also operates, as does *Liberty Lobby*, to shift the prior balance of power among classes of litigants.³⁷² This area of litigation lacks

371. *Matsushita*'s status as a complex antitrust case makes its assessment more difficult. One author has posited that courts are less willing to send a weak antitrust case to a jury because the consequences of the jury's acceptance of weak plaintiff's evidence is the severe treble damages penalty for defendant. See Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 Geo. L.J. 1065 (1986). Recent cases seem consistent with this trend. See, e.g., *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252-56 (2d Cir. 1987) (evidence of parallel conduct alone is insufficient to permit inference of conspiracy; to permit jury to consider conspiracy allegations, antitrust claimant must also show evidence of other facts that are at least as consistent with concerted action as with independent but parallel conduct). In *Apex*, the court found the "ambiguous" evidence in addition to the observed parallel conduct would not permit a reasonable inference to be drawn in the claimant-nonmovant's favor and that summary judgment was therefore appropriate as to three of six defendants. By definition, ambiguous information is capable of more than one meaning or inference. In characterizing requested inferences from ambiguous evidence as "unreasonable," the court was in effect saying that it found the claimant's requested inferences less plausible or likely than those of the defendants, in effect removing from the jury its historic power to decide questions of fact inference. The *Apex* opinion reads as though it is based more on antitrust law and the range of reasonable inferences permitted under that law than it does a generalized summary judgment opinion. It draws its authority to reject claimant's requested inferences from antitrust precedent, in addition to *Matsushita* (see *id.* at 252). The interesting trend to watch will be whether courts utilize *Matsushita* to extend this approach to cases other than antitrust claims. See *id.* at 252 (Supreme Court has encouraged use of summary judgment in complex cases). See also *Minpeco v. Conticommodity*, No. 81 Civ. 7619 (S.D.N.Y. Nov. 17, 1987) (applying *Apex* test to antitrust claim but denying summary judgment because in court's view claimant's evidence was sufficient to permit a reasonable juror to conclude that defendant participated in conspiracy). See also *Circumstantial Evidence*, *supra* note 27 (viewing *Matsushita* as open to conflicting interpretations but that better interpretation is linked to substantive antitrust law).

372. The Supreme Court has candidly observed:

A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.

empirical research even more than the question of who benefits from summary judgment. One can logically posit, however, that parties to a lawsuit bringing claims based on a theory of the case or an interpretation of behavior not readily apparent to the trial judge are often those litigants bringing novel claims designed to modify or extend existing law. It is in these test cases that theories of cause and effect or rethought interpretations of a statute, constitution, or rule are most likely to meet their demise under the "new" summary judgment, when the judge finds the suggested chain of events too improbable. Previously, such claims were more likely to withstand summary judgment.

Although the possibility of early elimination of novel claims is most unacceptable in cases in which a jury would be impaneled at trial, it has negative consequences for bench trials as well. The trial judge who first viewed a novel theory of the case and statutory interpretation with skepticism when raised at the pretrial conference may find the claims more plausible when outlined by human witnesses who have experienced the problems alleged in a complaint and when rebutted ineffectively by defense witnesses who seem to have something to hide. To some extent, this is what trial is all about. Without this characteristic, the federal system could be made truly "efficient" by providing for disposition upon a record composed of only filed discovery documents or summary statements made under oath by the parties' counsel (something of a return to the oral code pleading of England in the 1600s).

The implicitly increased power of the bench to assess the persuasiveness of facts and to treat fact-related determinations as matters of law could bring particular mischief to adjudication if, as has been suggested, judges currently are inconsistent and overbroad in incorporating extra-record matter into their decision making.³⁷³ Although Federal Rule of Evidence 202 permits judicial notice of adjudicative facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned and requires that the parties be heard before the court judicially notices facts,³⁷⁴ a court may unwittingly be determining facts or matters of law through a process of de facto judicial notice without so stating or so informing the parties. The greater authority to conduct fact assessment in general vested in judges by *Liberty Lobby* can only increase any incidence of abuse of de facto judicial notice already present in the system.

Although courts are technically required to determine adjudicative facts only on the basis of evidence of record and that which can be judicially noticed, courts have

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 n.17 (1984). Although Justice Stevens' statement is probably a realistic assessment of what triggers courts to deem a question one of law rather than fact, thus solving a definitional problem the Court has found "vexing" (see *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982)), it is hard to square this legal realist proposition with the officially articulated domains and power balance of factfinders and law interpreters. When the factfinder is a jury, serious seventh amendment and antidemocratic concerns arise as well. Equally troublesome in cases such as *Bose*, in which the Court has overturned fact findings, is the Court's reliance on English practice. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 502-03 n.20 (1984). England has no seventh amendment and has for all purposes eliminated the civil jury and the grand jury. England hardly provides an absolute yardstick for measuring American judge-jury/fact-law divisions. See JAMES & HAZARD, *supra* note 11, § 6.7, at 299-300; Higginbotham, *supra* note 358, at 952.

373. See, e.g., Davis, "There is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

374. FED. R. EVID. 202(b)(e).

significantly more freedom to engage in legislative fact finding.³⁷⁵ The classic definition of legislative as opposed to adjudicative facts states that facts which inform the courts' decisions on questions of law or policy are legislative facts.³⁷⁶ Professor Peggy Davis has persuasively argued that many courts have taken inappropriate and overbroad approaches to adducing legislative facts.³⁷⁷ To the extent that *Matsushita* permits more pretrial determination of cases based on an expanding notion of what comprises a question of law or matter of policy, it permits greater judicial discretion less subject to control than did the more confining case law prior to 1986 and thus diminishes the traditional role of the jury.

C. *The Questionable Efficiency of the New Summary Judgment*

The notion of "efficiency" and its relationship to justice require a word. The dictionary defines efficient as "productive of desired effects; *esp.* productive without waste,"³⁷⁸ and defines efficiency as an "effective operation as measured by a comparison of production with cost (as in energy, time, and money)."³⁷⁹ The concept of efficiency, then, considers and balances cost, speed, and output. Too often in the current debate about the perceived need for procedural reform to meet the emerging "litigation explosion/crisis" those advocating procedural amendments designed to ease the barriers to case termination assume (or at least talk as though) any change that makes adjudication faster or cheaper in the aggregate is more efficient and therefore "better."³⁸⁰ Discussion of the quality of the judicial product under the advocated streamlined system is almost nonexistent.³⁸¹ Viewing the current fashion in procedural

375. See Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 982-83 (1955); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270-71 (1944).

376. See Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) (court finding "facts concerning the immediate parties—what the parties did, what the circumstances were—" is finding adjudicative facts; when court "wrestles with a question of law or policy, it is acting legislatively, . . . and the facts which inform its legislative judgment may conveniently be denominated legislative facts.").

377. See Davis, *supra* note 373, at 1593-1604. See also Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986) (suggesting inconsistency and problems in court use of social science data and proposing that studies be treated by courts as legislative fact). In her article, Professor Davis notes that in *Bulova Watch Co. v. Hattori & Co.*, 508 F. Supp. 1322 (E.D.N.Y. 1981), the court "relied heavily on its own research into the history and structure of multinational corporations in general and Japanese multinationals in particular" but did not "exclude the parties from its investigative and decision-making process," a means of legislative factfinding of which she generally approved. See Davis, *supra* note 373, at 1598-99. By contrast, the *Matsushita* Court appeared to be relying upon its extra-record notion of how businesses, particularly Japanese businesses, behaved.

378. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 397 (9th ed. 1983).

379. *Id.*

380. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 388-89 (1986) (advocating incentives for settlement and barriers to court access but not addressing questions of quality of decision making and social need); Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985) (concluding that many of those suggesting streamlined litigation, such as Chief Justice Burger, seek increased speed and lowered costs without regard to reforms' impact on quality).

381. See Redish, *The Federal Courts, Judicial Restraint, and The Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378, 1386 (1985).

[I]f one myopically focuses upon the administrative dangers caused by docket size, one is likely to accept most judicial attempts to curb those dockets, for the very reason that they have that effect. A critical examination of the development of specific judicial doctrines affecting the scope of the courts' jurisdiction, however, highlights the existence of values other than docket reduction and underscores the reasons for the provision of federal jurisdiction in the first place.

Id. at 1386. See also Dworkin, *Why Efficiency?*, in *LAW, ECONOMICS AND PHILOSOPHY* 123 (M. Kuperberg & C. Beitz ed.

reform, it seems that many of the proponents of change have their priorities improperly reversed. One would expect the Court, when confronted with a proposed amendment or reinterpretation of a federal rule of civil procedure to first ask whether the change will improve the accuracy of court determinations or otherwise make adjudication more just. The *Liberty Lobby* summary judgment test will probably reduce the accuracy of trial court determinations. Of course, it remains possible that many meritless claims are given a full trial but do not result in claimant verdicts because most juries are reasonable and recognize the weaknesses of such claims. If this is the case, the cost to the judicial system is not ultimate error in the result but the cumulative resources spent adjudicating these hypothetically poor claims from the denial of summary judgment through trial. To state the obvious, no one knows whether and how often this occurs. No credible attempt has been made to place a price tag on the time spent on trials resulting in defense judgments in cases that the judges, if aggressively applying *Liberty Lobby*, would have eliminated prior to trial. The Court and others urging the tougher summary judgment doctrine assume the costs are not only substantial but also that they outweigh the value of any tendency in pre-*Liberty Lobby* summary judgment to permit claims as to which the judge is skeptical to proceed to a claimant's verdict that withstands post-trial motions and appeal.

In changing rule 56, the Court implicitly has decided that the economic gains of the change are worth any reduced accuracy and justice to some claimants. My criticism of the Court stems in part from its failure to conduct this decision openly and upon a factual record rich enough to permit reasoned decision. In addition, suggestions that more widespread use and granting of summary judgment will lead to faster, less expensive adjudication (irrespective of the accuracy of outcome) overlook several considerations militating against such anticipated benefits.

First, a summary judgment takes time to prepare and support. Although perhaps not so time consuming to counsel and client as trial preparation, the differences may not be particularly significant. Second, whatever the time and cost savings to litigants, the motion requires more judicial time than otherwise consumed by pretrial procedures. The judge deciding a summary judgment question must along with her law clerks read, research, reflect, hold a hearing, read and research some more, and often must draft, revise, and issue a lengthy written opinion as well. Although presiding over a jury trial takes time, it may not take any more of the judge's time than does consideration of the summary judgment motion. While jury trial proceeds, the law clerks are usually free to perform other tasks and the judge, although unlikely to admit it, may be reading orders, pleadings, motion papers, and draft opinions while on the bench. With the average cost of an hour of judicial time estimated at \$600 per hour,³⁸² one can argue that use of summary judgment may exact a higher total cost to the system than it saves the system and its participants.

1983); Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987); Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980) (arguing that efficiency is not an independent concept, it exists as "a function of a particular distribution" of wealth or power).

382. See Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219 (1985) (considering costs of salary, staff, benefits, and facilities, one hour's use of a judicial chambers costs the government an average of \$600).

Third, and most obvious, the summary judgment usually saves time only when it is granted and terminates a case or is sufficiently partially granted to streamline trial of a case. Ordinarily, when the motion is denied, it has merely added more pretrial work without reducing the work required at and after trial. Even the suggestions that summary judgment motions serve to "educate the judge"³⁸³ or increase the chances of a directed verdict at trial do not refute this essential truth. Until one has more facts, the claims that a *Liberty Lobby* approach will save time and money are only claims and theory, not even compelling theory at that.³⁸⁴

Although restrained use of summary judgment has been criticized as permitting too many needless trials and thus expending more judicial and legal resources than necessary, the same criticism can easily be made of the "new" post-*Liberty Lobby* summary judgment. Perhaps this is why so many trial judges stopped short of employing summary judgment as aggressively as they might directed verdict. As one commentator assessed the practical shift in litigants' costs brought on by *Liberty Lobby*:

The party with the burden of proof would be committing legal suicide by opposing a motion for summary judgment by resting on inadmissible evidence. Thus, *Anderson* augers more than trial by affidavit. It may require total development of a claimant's case prior to trial. This is counterproductive. Why require a plaintiff to take needless depositions when he or she could call those witnesses at trial? This expense is avoidable. An attorney would be bordering on malpractice, in light of *Anderson*, if he or she failed to muster all the evidence in support of the essential elements of the client's case on the motion for summary judgment. A prima facie case may not convince the court that the "quantum" of proof necessary to reach the jury exists.³⁸⁵

D. Confidence in the Reliability of Judgments

The Supreme Court's new attitude toward eased summary judgment also permits more case disposition based upon an incomplete, possibly inadequate, or sometimes fraudulent record. In the celebrated asbestos³⁸⁶ and Dalkon Shield³⁸⁷ cases, for

383. Many practitioners seem to believe it worthwhile to make a summary judgment, or any motion, even if it is unlikely to be granted so that the motion may "educate the judge" to the fact and law arguments of the parties as well as the movant's theory of the case. See HERR, *supra* note 18, § 3.6, at 41-42; § 16.1.2, at 344. However, this tactic can obviously be abused and wasteful, especially when the motion requires a good deal of time and effort to make and prosecute. In addition, "a motion made and lost before the court may only prejudice the judge against your asserted facts and legal argument at trial." *Id.* at 344.

384. See *infra* note 449. Even the most thorough studies of the courts have failed to conclusively determine court time saved when a matter is tried to a jury. See, e.g., H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN THE COURT* 71-86 (1959) (concluding that jury trials take longer than bench trials but that types of cases tried to bench not strictly comparable to jury docket; the authors also concluded that prospective time savings did not justify curtailment of jury trials). Studies such as the University of Chicago jury project have not focused on the time saved if a matter slated for jury trial is resolved by summary judgment or directed verdict. Court studies to date have tended to focus upon time spent at trial and ignored the total resources, private as well as judicial, spent on adjudication, particularly pretrial activities. For a discussion of the difficulties presented by empirical study of the courts, see Hazard, Book Review, 48 CAL. L. REV. 360 (1960).

385. Vairo, *supra* note 74, at 25.

386. See D. HENSLEY, *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 24 (1985). In cases involving alleged harm from exposure to dangerous substances when the claimed condition has a long latency period, both summary judgment and expeditious trial may result in inaccurate determinations of causation because good epidemiological studies are not yet available. Perhaps the judicial system would best adjudicate these cases by permitting claimants to toll the statute of limitations with a notice of claim until such time as the claimant is prepared to file suit on the basis of subsequently developed evidence.

387. See M. MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (1985) [hereinafter Mintz].

example, defendants fared well initially. Subsequently, redoubled discovery efforts resulted in unearthing new evidence that ultimately carried the day for plaintiffs. In light of *A.H. Robins*, maker of the Dalkon Shield, shredding or concealing relevant documents requested by the opposition,³⁸⁸ the cases provide striking examples of the wisdom of refraining from a rush to judgment in the name of efficiency. Although avenues for attacking a wrongfully obtained judgment exist, they are not always effective³⁸⁹ and are frequently costly and cumbersome for the party who did nothing wrong.

Even absent fraud or the need for additional time, a rule making summary judgment too easy adversely reduces the accuracy of court decisions. Inevitably, summary judgment is granted or denied based on a record less informative than that achieved through trial. Consequently, one should always be less confident in the result obtained through summary judgment than that obtained at later stages of trial. A comparison with the confidence associated with probability theory or sampling data patterns is instructive.

In announcing a finding based on sampling information, a researcher rarely speaks simply of the conclusion she has reached, but rather of that conclusion as an important part of the researcher's findings. A statistician, for example, will often describe findings in terms of "confidence intervals" or "statistical significance."³⁹⁰ A finding based on assessment of a sample is said to be statistically significant at, for example, the .05 level, when there is, according to the methodological calculations accepted in the field, less than a five in one hundred chance that the observed sample result (*e.g.*, votes for Reagan versus Mondale, preference for Colgate versus Tom's Toothpaste) occurred because of random chance that in any given sample, a given response pattern would emerge. Although the researcher can never be sure that the observed results are "correct" in the cosmic sense, he or she can know the likelihood that the observed results were an accident or coincidence rather than an actually existing pattern.

388. *See id.*

389. Rule 60(b) provides that a judgment may be set aside on various grounds, including fraud, newly discovered evidence, or "any other reason justifying relief." However, virtually all of these motions must be brought within one year, the outer limit of what most courts consider a "reasonable time" as provided by the rule absent unusual circumstances. *See Herr*, *supra* note 18, § 24.3.

390. A confidence interval is the range within which the actual answer lies. For example, if a public opinion poll on the eve of the 1984 election shows that of the committed voters, 56% favor Reagan and 44% favor Mondale and the poll has a "sampling error" or confidence interval of plus-or-minus 3%, the range of the confidence interval in the Reagan vote is from 53% to 59%. The survey researcher is said to be "confident" that if the election had been held that day, the Reagan vote would fall between these parameters, despite the difference in his sample size (*e.g.*, 2,200 respondents) and the total vote. The sample taken of the electoral result may also be said to be statistically significant to the degree to which its results are likely to have occurred through random chance or sampling error. *See R. WINKLER & W. HAYS, STATISTICS: PROBABILITY, INFERENCE, AND DECISION* 400-03 (2d ed. 1975); T. WONNACOTT & R. WONNACOTT, *INTRODUCTORY STATISTICS FOR BUSINESS AND ECONOMICS* 141-47, 193-96 (2d ed. 1977) [hereinafter WONNACOTT]; Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385 (1985) [hereinafter Cohen]. Professor Cohen notes that in civil litigation the factfinder making an assessment of what actually "happened" in a dispute is not only determining whether the preponderance of the evidence—more than 50%—weighs in a claimant's favor but that the factfinder "also must have a certain level of confidence that the true probability, based on all possible evidence, exceeds that 50% threshold." Cohen, *supra*, at 399. In other words, a finding for claimant implicitly means that the factfinder has found that the entire confidence interval of the factfinder exceeds the 50% threshold.

Generally in the social sciences and statistics, one obtains statistically significant results at the .05 level whenever one surveys a very large sample (which will produce a result likely to be nonrandom even when the observed relationship is small) or when one observes a very large relationship in even a relatively small sample.³⁹¹ As a general rule, the precision of the experimental results and, therefore, the scientists' ability to speak confidently about a finding increases with larger data bases. When one makes an observation at the .01 or .05 level, the finding is relatively reliable for even "weak" relationships.³⁹² One can transfer this approach by analogy to the civil trial system and begin to appreciate the wisdom of the civil jury system.

For example, a finding by one person that the defendant was eighty percent negligent in causing an automobile accident would instinctively be viewed by most of us as unreliable to show that the defendant was more than fifty percent negligent. The person making the finding may or may not be a good (or even representative) factfinder. However, if one thousand persons find the defendant fifty-one percent negligent, most of us would accept this "verdict" as reliable and true despite the lower magnitude of the negligence finding in our second case.

The instinctive view is supported by statistical methodology. If instead of adjudicating negligence, the one person were flipping a coin twice and obtained heads, this would not be a very strong indication that the coin was unfair. If, however, after one thousand coin flips we obtained six hundred heads and four hundred tails, we could confidently conclude that the coin was unfairly biased to come up heads more than half the time. According to standard statistical methodology, the two coin flip sample has no statistical significance or meaningful confidence level. The one thousand flip exercise, on the other hand, is statistically significant at the .01 level (only a one in one hundred possibility of occurring by random chance rather than reflecting a real pattern in the coin flips), suggesting little room for error.³⁹³

391. See Cohen, *supra* note 390, at 401 ("At any particular confidence level, the interval [estimate of probability] gets smaller as the quantity of data from which the estimate was derived increases."); Wonnacott, *supra* note 390, at 147.

392. A .05 level of statistical significance is a confidence level or interval of 95%. In other words, when a social scientist accepts a sampling observation as being statistically significant at the .05 level, she is confident that 95% of the observations in the sample bracket the actual mean or average observation of the population. See D. BARNES, *STATISTICS AS PROOF* 235-36 (1983); Wonnacott, *supra* note 390, at 141-47.

For example, for sampling preferences for the Reagan-Mondale presidential race, the sampler is attempting in the sample poll to have a response from those sampled that reflects the electorate's actual voting preference. Based on the sample size, the sampler, through a mathematical formula, constructs an interval that brackets the sample mean. If, therefore, 55% of the sample of 2,000 voters say they will vote for Reagan and the sampler wants to speak with a 95% confidence interval, then she will construct an interval around the 55% sample mean, a "plus-minus" figure (e.g., 3%) that will encompass the true mean of the electorate's response 95% of the time. In this hypothetical case, then the researcher is 95% certain that the actual preference for Reagan in the electorate as a whole lies between 52 and 58%. However, in performing similar surveys for 100 presidential elections with similar samples, the actual electorate preference will lie outside the opinion poll's confidence interval in five of those elections. In addition to changing voter sentiment between the survey date and election day, this is why the Gallup and Harris Polls are occasionally perceived as "wrong" in showing voter preferences that differ by more than a point or two from the actual election results.

Thus, an interval estimate of any sample (like the presidential preference poll) tells one how precise is the sampler's "guess" by also describing a range of values within which one has a particular level of confidence that the true value lies. If we have a sample, mean, and interval estimate with .05 significance, we are 95% confident that the real answer lies within the range posited from the sample and reasonable inference. See Cohen, *supra* note 390, at 399-401.

393. Saying that the chances of a fair coin coming up heads is .5 is itself an estimate of probability.

[I]f one had perfect information about, say, the placement of a coin on the flipper's thumb, the mass distribution of the coin, air currents, and the force exerted in flipping the coin, one could predict with certainty whether a

As Professor Cohen has demonstrated, the process of adjudication is essentially a determination of probability. The factfinder determines that a given event or cause of an event was more probable than not and then finds for the claimant asserting the probable fact or theory.³⁹⁴ Although the standard inquiry is phrased as though the

flipped coin would turn up heads or tails and would not need to resort to the use of probabilities. To state that the probability of heads from a particular flipped coin is 0.5, then, is to concede a certain amount of ignorance.

Cohen, *supra* note 390, at 397 n.74; see also Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1066 (1968).

In addition, Professor Cohen extrapolates from this observation an analysis that underscores the Supreme Court's error in *Matsushita*.

In the legal context, an analogy can be made to the distinction between circumstantial evidence and "smoking guns." If the factfinder has incontrovertible evidence that a particular event occurred—a smoking gun, so to speak—the probability that the event occurred is 1.0. In the absence of a smoking gun, however, we are left with circumstantial evidence from which only probabilistic judgments can be made.

Cohen, *supra* note 390, at 397 n.74.

Recall that in *Matsushita*, the Court majority declared that an "implausible" theory of the case could not support a claimant's judgment on circumstantial evidence alone but required direct evidence—a smoking gun, so to speak. In other words, the Court required the *Matsushita* plaintiffs to prove their claim with evidence establishing a 100% chance that the claimed events occurred. However, under the law, a civil claimant need only prevail by a preponderance of the evidence, more than 50%. If the *Matsushita* approach were taken on a widespread basis, litigants pressing claims disliked by the judge could be permitted a jury trial only where they in effect had a confession or videotape of the defendant committing an unlawful act. In the realm of discrimination, antitrust, securities violations, and commercial fraud, such evidence is seldom available, suggesting that continued use of the *Matsushita* approach could extinguish jury trial for certain judicially disfavored claims, a result at odds with the seventh amendment. See also Dawson, *Probabilities and Prejudice in Establishing Statistical Inferences*, 13 JURIMETRICS 191, 192 (1973) (indirect evidence as well as direct evidence tends to establish a proposition).

394. See Cohen, *supra* note 390, at 399–400. Professor Cohen describes a simple factfinder assessment of probability (e.g., more than 50% of the proof favors the claimant) as a "point estimate." An assessment that the claimant has proven its case by something between 50% and 70% of the evidence is an "interval estimate." According to Professor Cohen:

An interval estimate goes beyond the "best guess" provided by the point estimate. It tells us how precise that guess is by describing the range of values within which one has a particular level of confidence that the true value lies. The point estimate, which does not indicate its precision, gives the user who is not aware of its nature a false sense of exactitude.

Id. at 400.

Based in part on this observation, Professor Cohen argues that a claimant should succeed only when the entire confidence interval in its proofs exceeds 50%. If, for example, the factfinder's confidence interval straddles the preponderance of the evidence line, e.g., say a sense by the factfinder that the weight of the evidence is somewhere between 40 and 60% in favor of the claimant, the judgment should be for defendant. According to Professor Cohen, judges and juries may do this implicitly in most cases (*id.* at 418–19), a conclusion with which I agree, with one qualification.

My own view is that both juries and to a lesser extent judges occasionally forgive a claimant that part of the confidence interval that falls below the preponderance of proof line when there are mitigating circumstances in claimant's favor. One example would be when plaintiff has suffered a crippling injury and defendant will not be substantially affected by an adverse judgment, even a large one. Another might be when there is a sense that not all of the evidence has been unearthed and much of the "real" knowledge or proof is within defendant's control. According to L. Jonathon Cohen, spoliation of evidence or its possible concealment is a fact to be considered by the adjudicator in deciding a case. In other words, the factfinder should, and often implicitly does, take into account the likelihood that a party has attempted to better its presentation by altering, destroying, fabricating, or merely legitimately failing to disclose evidence. See L.J. COHEN, *THE PROBABLE AND THE PROVABLE* (1977). But see Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487; Kaye, Book Review, 89 YALE L.J. 601, 608–10 (1980) (contending that factfinder should account for a party's failure to produce evidence likely to exist and within its control in deciding whether to accept or reject claim based on probability inferences from evidence of record). In such instances, it seems to me, the factfinder is implicitly making a judgment that claimant is boosted over the preponderance line by policy factors deemed even more important than strict decisional accuracy or confidence. My own view is also that the judicial system should tolerate such silent occasional "fudge factors" as an inevitable occurrence in a system that serves multiple goals (e.g., compensation, deterrence, public perception of access, justice) in addition to accuracy and consistency. See Nesson, *The Evidence or the Event?*, 98 HARV. L. REV. 1357, 1359 (1985) (arguing that trials should not aim primarily to generate mathematically precise results as to produce socially acceptable decisions); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1367–77 (1971) (arguing

factfinder were merely deciding whether the claimed occurrence was more than fifty percent likely to have happened, the trier actually is probably doing something more sophisticated, determining that it has confidence that the entire range of possibility surrounding its assessment of what "really" happened exceeds fifty percent.³⁹⁵ That is, the trier determines that the probability of the existence of the claimed event or explanation is somewhere above fifty percent and that even accounting for the possibility of error in the analysis, the probability of the occurrence likely does not fall below fifty percent.

Even though adjudication does not so much resemble repeated data of the same nature on the same point but rather resembles a variety of evidence directed toward the existence of the point,³⁹⁶ this analogy can be carried to the differing reliabilities of adjudication by summary judgment, directed verdict after plaintiff's case, directed verdict after the close of the evidence, trial, or judgment n.o.v. At the summary judgment stage of litigation, even after extensive discovery, the data base upon which a court decides can be defined as "X." Even if X is good, it gets better as the case proceeds. After plaintiff's case, the court has added to the data base any additional discovery, counsel have sharpened their analyses of the evidence as trial approaches, and the judge has heard live witnesses testify and discuss documentary, real, and demonstrative evidence. The data base at the first directed verdict juncture can thus be defined as "X plus something," often quite a significant something.

After the close of the evidence, the judge has heard additional testimony and explanation, including defendant proofs directed toward plaintiff's actually presented evidence. The data base is "X plus something plus something more." When the factfinder, judge or jury, retires to review the evidence and argument and to reflect on the issues in the case, more is added to the data base, which then becomes "X plus something plus something more plus something more."³⁹⁷ After the trial result, even if the judge is appalled by the jury verdict, the verdict is at least informative to her as the verdict loser presents a judgment n.o.v. or new trial motion. The judge not only has the jury verdict as input (supplemented by the length of their deliberations, whether and what questions were asked, whether the answers to jury interrogatories were internally consistent, etc.) but also reflects again on the record in light of the verdict and newly refined arguments of counsel. A court's decision on the judgment n.o.v. or new trial motion stems from a data base of "X plus something plus something more

that trial outcomes involve some values even more important to society and judicial system than strict accuracy of factfinding).

395. See Cohen; *supra* note 390, at 399, 403-04. See also Johnston, *Baysian Fact-Finding and Efficiency: Toward An Economic Theory of Liability Under Uncertainty*, 61 S. CAL. L. REV. 137, 150-63 (1987) (suggesting defendants determine apt level of care by estimating likely proportion of adverse verdicts based on given quantum of evidence available for trial; implicitly posits that potential defendants use a confidence interval approach to estimating likely jury result).

396. See L.J. COHEN, *THE PROBABLE AND THE PROVABLE* (1977).

397. According to James and Hazard, the quality of the records at summary judgment and trial differ for several reasons: (1) cross-examination at trial may expose error or cast a different light on documents or testimony; (2) the summary judgment record lacks demeanor evidence; (3) the possibility that "persons who are willing to perjure themselves in an affidavit and even in the informal atmosphere of a deposition may be impelled by the formal trappings of trial and the personal presence of the judge to tell the truth." JAMES & HAZARD, *supra* note 11, § 5.19, at 274-75.

plus something more plus more still.”³⁹⁸ At each stage of the enlargement of the data base, the confidence in the correctness of the result should increase.³⁹⁹

Viewed this way, the judgment n.o.v. or new trial, despite overturning a jury verdict, is less problematic than the directed verdict or the post-*Liberty Lobby* summary judgment that acts as a directed verdict clone. A judicial decision overturning a jury verdict after trial and deliberation is based on a far more extensive data base than a grant of summary judgment that precludes a jury from ever hearing the case. Thus, our confidence in the correctness of the result in the judgment n.o.v. or directed verdict context exceeds our assurance that a court correctly decided the summary judgment motion and provides greater justification for overturning a jury determination than for precluding the jury determination.

Interestingly, the largest increase in the data base and its reliability occurs between summary judgment and directed verdict at the close of plaintiff’s case. *Liberty Lobby*, by changing rule 56 to the directed verdict standard, thus permits courts to conclude a case as though they did so upon a much richer data base than actually possessed. In that sense, *Liberty Lobby* is bad science and probability theory, as well as bad law.

The problems in this approach are not assuaged when the summary judgment record is largely or even exclusively documentary. Although some jurists have suggested that documentary evidence can be or should be as easily reviewed by an appellate court as by a trial court, this view was rejected by current Federal Rule of Civil Procedure 52⁴⁰⁰ as well as the Supreme Court’s decision in *Anderson v. City of Bessemer City, N.C.*⁴⁰¹ Today, the rule is that a trial court’s factual findings based upon documentary evidence are to be reviewed under the clearly erroneous standard as would trial court fact findings based on witness testimony. The theory, as declared in *Bessemer City*, behind applying the clearly erroneous rule to district court fact findings based on documents as well as findings based upon testimony rests on efficiency and respect for district courts.⁴⁰² De novo appellate review of documents would be time consuming and expend substantial judicial resources for little perceived improvement in the accuracy of case decisions. It also would tend to denigrate the deference ordinarily paid the trial court regarding fact finding.

There is one additional drawback of de novo appellate review of documents that the *Bessemer City* Court and the Advisory Committee Note concerning rule 52 failed to mention: it is usually a poorer quality of fact finding than that conducted by the trial

398. Cf. Cooper, *supra* note 323, at 903 n.1 (arguing that directed verdict is advantageous to judgment n.o.v. in that it saves time of closing arguments, instructions, and jury deliberations and does not require invalidation of verdict already reached but suggesting that judgment n.o.v. is nonetheless a necessary adjunct to directed verdict).

399. Professor Moore’s slant on the comparative advantages of summary judgment and directed verdict is somewhat different from that of Professor Cooper. Moore observes that neither motion saves time when it is reversed on appeal and that “[l]ive trials before the trier of facts, who can observe the demeanor of witnesses should be had where there is any reasonable doubt as to the facts.” See Moore, *supra* note 164, ¶ 56.02[10].

400. See FED. R. CIV. P. 52(a) (“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”).

401. 470 U.S. 564 (1985).

402. *Id.* at 575.

court. At trial, the documents are not merely heaped before the trial judge, poised to give her eyestrain and boredom for days or weeks to come. Even in cases with less than stellar trial counsel, the documents are ordinarily introduced through live witnesses who not only authenticate the document but also explain its contents and significance, pointing out specific passages, illustrating and elaborating as the document is discussed. The judge's attention is both drawn to the document, even when it is turgidly written, of poor legibility, or unduly boring, and rewarded with explanation and memory reinforcement.

By contrast, an appellate court reviewing this same documentary evidence will receive it as part of a designated record or joint appendix. The appellate record may or may not contain a transcript of the witness's description and interpretation of the document. Even the most diligent circuit panel will not be as well equipped to determine facts from the document as was the district court. Realistically, most circuit judges will lack the energy and will to give the document the same consideration that the trial judge was forced to give to the paper in open court through a live witness and counsel. In the same way in which the trial court is better suited than the appellate court to weighing documentary evidence, the trial court at trial probably reaches more accurate conclusions about documents than does the trial court reviewing a summary judgment record. Even with the aid of well-prepared briefs, the court deciding a summary judgment motion faces an essentially "cold" paper record similar to the appellate record. The judge may simply miss facts contained in documents attached to one of many affidavits or misunderstand the documents.⁴⁰³ This problem is obviously exacerbated when counsel fails to highlight portions of the record favorable to its position on the merits. This may have been what happened in *Catrett*.⁴⁰⁴

When a judge has a predisposition on the case, particularly a desire to end the case by granting summary judgment, he or she may inadvertently grant too much

403. See Bergman, *Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About*, 75 Ky. L.J. 841 (1987) [hereinafter Bergman] (hearsay statements contained in documents, including authoritative documents, are frequently ambiguous and their precise meaning cannot be delineated without cross-examination or other exploration). *Accord* Towne v. Eisner, 245 U.S. 418, 425 (1918) ("A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used"); J. MAKAY & B. GAW, *PERSONAL AND INTERPERSONAL COMMUNICATION* 110-11 (1975) (most effective means of resolving ambiguity or vagueness is to ask follow-up questions); Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 966-69 (1974) ("role of cross-examination with respect to ambiguity is particularly important").

Professor Bergman also observed that persons viewing documents tend to fill in the interstices of missing information according to their own expectations of what usually happens in such situations. Bergman, *supra*, at 861-63. This tendency also underscores the possible impact of a shift from jury assessment to judge evaluation if in fact the judges interpret or "fill in" ambiguities in documentary records in a manner distinct from that of the juries. In addition, the fact inferences and legal conclusions drawn by judges may differ from those of juries. As Bergman observed, "[c]ircumstantial evidence leads to a conclusion only by means of an underlying premise. By choosing different premises, one can draw opposite conclusions from the same piece of evidence." *Id.* at 854 (citation omitted). For example, the *Matsushita* Court's decision clearly involved the Justices' underlying premises about the business world, forming their universe of permissible inferences and the degree to which they mentally completed any gaps in the record. See *supra* text accompanying notes 80-98.

404. *Celotex v. Catrett*, 477 U.S. 317, _____, 106 S. Ct. 2548, 2556, 2558-60 (Brennan, J., dissenting) (contending that evidence in record prior to filing of summary judgment motion showed exposure of plaintiff's decedent to Celotex asbestos product).

credence to documents set forth by the movant.⁴⁰⁵ When these documents do not have witness exposition, cross-examination, and focused consideration, there is less with which the nonmovant can expose the self-serving, unreliable, or unpersuasive character of the movant's documents. In a case alleging an antitrust conspiracy, for example, a defendant may move for summary judgment based on a letter to salespersons instructing them not to compare prices with competitors. On its face, the document seems to show that defendant wanted to avoid even the possible appearance of collusion with others.

At trial, however, the witness through which the document is introduced (or another witness) may admit under cross-examination that the letter was part of the company's smokescreen and was mailed to the sales force one day after they met at corporate headquarters to plot the price fixing plan. A less Perry Mason-like scenario would see the factfinder, perhaps especially a jury, finding the document not to ring true in the context of all of the evidence shown at trial (*e.g.*, expense records showing salespersons from all fourteen widget-maker defendants stayed at the same hotel and ate meals together for three days prior to defendants' announcements of congruent prices during the ensuing two weeks).

Because a court acquires more information after the summary judgment juncture does not mean that a court can never grant summary judgment. It should mean, however, that courts will not grant the motion unless the nature of the record allows confidence in the correctness of the result similar to a social scientist's confidence that research findings were unlikely to have resulted from random chance. In my view, the traditional rule 56 better accomplishes this than does the post-*Liberty Lobby* approach to summary judgment.

Another comparison between adjudication and social science "proof" is instructive. Because adjudication, like sampling, is to some extent an assessment of probability, the adjudication process can produce two possible errors. One error is wrongfully finding liable a defendant who is not in fact liable. This is "false inculcation" or "Type I" error according to social statistics terminology. The second potential error is wrongfully exonerating a defendant who is actually liable. This is "false exculpation" or "Type II" error in social statistics language.⁴⁰⁶ When the judicial system adopts a standard of proof for a claimant and any explicit or implicit confidence interval that must be satisfied to meet that standard of persuasion, it determines how often the system will produce Type I and Type II errors. For example, adopting the standard social science requirement of a ninety-five percent

405. Those endorsing the purported greater accuracy of findings based on documentary rather than testimonial evidence (*see* Cooper, *supra* note 323, at 934 n.93) appear to overlook that trial provides the factfinder with both types of evidence rather than documentary evidence alone, as does summary judgment. Logically, the quality of trial determinations should exceed that of summary judgment absent the presence of prejudice at trial. While prejudice undoubtedly occurs at trial, it can exist as easily in pretrial determinations.

406. *See* Cohen, *supra* note 390.

When we express a particular level of confidence in a probabilistic determination, we are making a statement about the risk of Type I (false inculcation) error associated with that determination. The relationship between the two concepts is direct: the risk of Type I error . . . is equal to one minus the confidence level. Choosing a confidence level of ninety-five percent is thus the equivalent of accepting a five percent risk of Type I error.

Id. at 410-11.

confidence interval means that the system will accept a five percent risk of Type I error. Using this standard in litigation would probably mean that five percent of the defendants found liable were actually not in fact liable. Once the confidence level required of a claimant is set, it determines the risk of Type II error as well. Although this cannot be done with mathematical precision without knowing much, often unknowable, information, there is authority suggesting that in some contexts requiring a ninety-five percent confidence level for claimants results in as much as a fifty percent chance of Type II error.⁴⁰⁷ In other words, requiring the confidence level normally associated with social science proofs may mean that half the defendants found not liable ought in fact be found liable to the claimant.

A discussion of the "right" confidence level to require for civil litigation and the means to operationalize it lies beyond the scope of this Article. As Professor Cohen has noted, social scientists have distinct reasons for adopting the required confidence interval at a level that errs in favor of wrongfully rejecting a correct theory in order that an incorrect theory not be wrongfully accepted and enshrined. In civil litigation, however, we probably do not want to err so far in this direction since the consequence of a Type I error is only the "unfair" judgment against a defendant or group of defendants rather than the systemwide adoption of an incorrect theory or world view.⁴⁰⁸

In the context of summary judgment, a judge's greater freedom to evaluate the quality of evidence seems to me likely to increase the likelihood of Type II error in civil adjudication. Prior to *Liberty Lobby*, a judge was constrained to allow a case to proceed to trial when the nonmovant's case was supported by some admissible evidence. Now, when the judge applying *Liberty Lobby* deems that evidence too weak to sustain a reasonable jury's verdict, she implicitly declares that the claimant's evidence of the probability of the truth of its assertions falls below the required confidence level. Because this determination is made on the basis of less data than is available at trial and because the increased use of summary judgment, on a practical level, inures to the benefit of defendants, the functional result of all this means a greater proportion of defendant victories than prior to *Liberty Lobby*. Because a given percentage of these defendant victories will be erroneous, the proportion of Type II

407. See Dawson, *Investigation of Fact—The Role of the Statistician*, 11 FORUM 816, 907-08 (1976) (employing statistical model of employment discrimination cases).

408. See Cohen, *supra* note 390.

It is conventional in both the physical and the social sciences to use the ninety-five percent confidence level in hypothesis testing and in constructing confidence intervals. This convention reflects nothing more than an arbitrary balancing of the disutilities or "regrets," of Type I and Type II errors. It represents a value judgment within the context of those types of research as to the relative costs of incorrectly proclaiming a result on one hand and incorrectly deeming a result not to have been demonstrated on the other. Researchers in these areas have chosen to accept a relatively high risk of Type II error (that of failing to reject the null hypothesis, and, therefore, of not accepting a proposition that is in fact true) in order to minimize the risk of Type I error (that of incorrectly rejecting the null hypothesis, and, therefore, of accepting a false proposition). Although this conservative balancing of risks may be appropriate for deciding when to accept a scientific hypothesis, it is not necessarily appropriate within the legal context. Before accepting this or any other convention for the legal standard of proof, its balancing of the risks of Type I and Type II error—and, therefore, the relative disutilities or regrets implicitly assigned to them—must be examined to determine if that balancing reflects appropriate social judgments in the context of civil litigation.

Id. at 412.

errors in the system will increase. Since the proportion of Type II errors already probably exceeds the proportion of Type I errors, the “new” summary judgment shifts the system’s results in favor of defendants and against claimants as well as permits this shift to occur upon a less rich data base. Once again, I question whether the Court has set forth a compelling reason for this shift. I do not take a position as to what interests should be most protected by the judicial system’s tolerance of Type I and Type II error. I do argue, however, that any change in the pre-existing balance of these chances for error should be accomplished through amendment of rule 56 and only after a strong showing of a need for change.

The “old” summary judgment prevented elimination of a claim so long as the nonmovant had a nonfrivolous side of the story to present to the factfinder at trial. This restriction on the grant of summary judgment operated to prevent the extinguishment of claims unless the record provided a considerable confidence interval for the view that the claim lacked merit. Under the post-*Liberty Lobby* summary judgment/directed verdict rule, a court may eliminate a claim when the judge finds the nonmovant’s supporting facts and their interpretation sufficiently unpersuasive. The judge can now act to extinguish a wider variety of claims on the same body of information previously thought too prone to error.

Under the “new” rule 56, our confidence in the correctness of the trial court’s summary judgment decision falls. Whether and how often it falls below an “acceptable” level of confidence (however that is defined), I leave to those examining the issue in greater detail. My own view, based on instinct and the preceding discussion, is that aggressive use of the “new” summary judgment will result in a percentage of erroneous dismissals of claims too high to be permitted by a federal system that purports to “do justice” and derives its legitimacy from the public perception that it reaches the “right” result in the vast majority of cases. Certainly, the new rule 56, whatever it gains the system in efficiency, will throw out more meritorious claims than did the old rule 56.

IV. PRETRIAL CASE DISPOSITION AT THE CROSSROADS

A. *Summary Judgment, Directed Verdict, the Court, and the Rules Enabling Act*

As previously discussed, *Liberty Lobby* was no mere clarification or refinement of federal summary judgment practice. Rather, *Liberty Lobby* effected a major change in federal summary judgment doctrine. In essence, the Court amended rule 56 to replace the words “genuine dispute of material fact” with words akin to “facts presented by the nonmovant of sufficient weight to convince the trial judge that he or she would not grant a directed verdict for the movant at trial.” As previously noted, these phrasings and formulations of summary judgment are vastly different.

The Rules Enabling Act of 1934⁴⁰⁹ sets forth the procedures by which the Federal Rules of Civil Procedure may be amended, abrogated, or replaced. Custom, informal practice, and Supreme Court orders have added to the system established by

409. 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2072 (1982)).

the Enabling Act. Today, the process works (or is supposed to work) as follows: the Federal Judicial Center maintains an Advisory Committee; the Advisory Committee is typically composed of leading academics, judges, and experienced practitioners; the Chief Justice selects a Chair of the Committee, usually a respected judge, and a Reporter for the Committee, usually a noted academic; the Committee itself examines the Rules to ascertain whether any amendments are needed and also solicits comments both as to suggested changes and the merits of Committee proposals.⁴¹⁰

Unfortunately, the Committee proceedings are often not well-publicized and the comments solicited are representative of only a rather narrow segment of the profession.⁴¹¹ Nevertheless, significant commentary is received and amendments are altered or deleted in response. The Committee eventually issues a final proposal on which comment then can be received as it is transmitted to the Supreme Court for review. Normally, the Court adopts the Committee proposal, which the Court promulgates as amendments to the Rules.⁴¹² These are then, pursuant to the express language of the Enabling Act, reported to Congress. Congress has ninety days to delete or amend the proposed changes, or to delay the effective date of the changes. If Congress does not act within the ninety-day period, the amended rules become effective with force of statute.⁴¹³

Since its passage in 1934, the Enabling Act has been widely hailed as an efficient and effective procedure, combining the best notions of protecting judicial expertise and prerogatives with democratic oversight through the elected legislature and its more visible deliberative process.⁴¹⁴ The Enabling Act, passed after nearly thirty years of off-and-on debate and reformist push,⁴¹⁵ is viewed as a wise compromise between the view that rules of procedure are best or exclusively made by courts, the judicially independent bodies that must apply the rules, and the position that rules possess the force of statutes and must be enacted by the legislature to be legitimate.

Under the Enabling Act, the body politic and legal profession ostensibly get to have it both ways. The Court, with the aid of the Advisory Committee, brings its

410. See Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUDICATURE Soc'y 250 (1963) [hereinafter *Federal Rule-Making*]; Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 674-77 (1975) [hereinafter *Contemporary Crisis*]; Lesnick, *The Federal Rule-Making Process: A Time of Re-examination*, 61 A.B.A. J. 579 (1975) [hereinafter Lesnick]; Levin & Amsterdam, *Legislative Control Over Judicial Rule-making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958).

411. See *Contemporary Crisis*, *supra* note 410, at 676-77, 682, 685; Lesnick, *supra* note 410, at 579-82. A significant revision of the Enabling Act, entitled the Rules Enabling Act of 1987, has been proposed as Title II of H.R. 2182, a general bill amending the judicial code. See CONG. REC. H5333 (daily ed. June 22, 1987). The provisions concerning the Enabling Act would require all Advisory Committee meetings to be open to the public and also require sufficient pre-meeting notice and the presentation of majority and minority reports regarding any proposed amendment to the Federal Rules. The bill was passed by the House on June 22, 1987 and referred to the Senate Judiciary Committee on June 23. As yet, the Senate has taken no action. See STATUS OF HOUSE BILLS, 2 CONG. INDEX (CCH) (1987-88).

412. See *supra* sources cited in note 410.

413. Section 2072 provides that promulgated "rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported." 28 U.S.C. § 2072 (1982).

414. See *Federal Rule-Making*, *supra* note 410, at 254-55; *Contemporary Crisis*, *supra* note 410, at 673-75. But see Amendments to Rules of Civil Procedure for the United States Dist. Courts, 374 U.S. 861, 865 (1963) (Black & Douglas, JJ., dissenting).

415. See Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) [hereinafter Burbank].

expertise to bear upon the matter, ensuring that the Rules and amendments are written in first instance by those experienced in their use and who must work under them in the future. Transmittal to Congress allows review by a group that is theoretically more demographically diverse as well as popularly elected.⁴¹⁶

In practice, the Enabling Act has been something less than a perfect panacea. The Act governs all federal rules—civil, criminal, evidence, bankruptcy, appellate—with separate committees for each. For the most part, Congress has not aggressively monitored or altered the rules reported to it by the Court. This has been particularly true with the Federal Rules of Civil Procedure, which seem to engender less passion than the criminal rules and less confusion than the bankruptcy rules. For the most part, then, the Act ushered in a prolonged era of Court rulemaking, perhaps more properly called Advisory Committee rulemaking, relatively unaffected by Congress.

To some extent, that has changed in recent years. In 1975, Congress suspended the effective date of the reported Federal Rules of Evidence and then rewrote the Rules extensively after a good deal of scrutiny.⁴¹⁷ In 1974, Congress played a substantial role in revising reported amendments to the Rules of Civil Procedure governing discovery.⁴¹⁸ Some commentators viewed this change in the traditional rubber-stamping pattern of Congress as evidencing a breakdown of the Enabling Act system and viewed the problem as stemming largely from the insular and closed nature of the Advisory Committee process and the Court's failure to adequately review the Committee's work.⁴¹⁹ Although these criticisms and their suggestions for a more open Committee process and sharper Court scrutiny have much merit,⁴²⁰ they perhaps minimize one positive aspect of these episodes—the showing that Congress can play a legitimate and active role as final backstop to any rules changes. Far from being broken, the Enabling Act system shows itself to be working well when Congress does not invariably endorse all aspects of the product of Committee and Court.⁴²¹

The history of the discovery and evidence rules demonstrates that having the Enabling Act rather than complete Court rulemaking power does make a difference.

416. Although the socioeconomic backgrounds of representatives and senators can hardly be called a reflection of the United States as a whole, (see Perry, *supra* note 192, at 574 n.73), they are probably more diverse than those of judges or justices. Most judges are from decidedly upper-middle class backgrounds, are white, are male, and have other indicia of elite prestige by virtue of being professionals, usually with high status schooling and pre-court work experience. See CHASE, *supra* note 367, at 113–14; SCHMIDHAUSER, *supra* note 367, at 41–104; Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664, 669–70 (1985). Congresspersons as a group have similar characteristics but exhibit greater diversity in income, education, race, geographic background, sociological background, and, obviously, occupation and prior work experience. See U.S. GOV'T PRINTING OFFICE, CONGRESSIONAL DIRECTORY 1987–88, at 4–231 (1987) (biographical sketches of Senators and Representatives); M. BARONE & G. UJIFUSA, ALMANAC OF AMERICAN POLITICS (1981).

417. See Lesnick, *supra* note 410, at 579.

418. See *Contemporary Crisis*, *supra* note 410, at 677–82.

419. See, e.g., Lesnick, *supra* note 410; *Contemporary Crisis*, *supra* note 410, at 685–86.

420. Both Professors Lesnick and Friedenthal urged more open Advisory Committee drafting activity designed to elicit greater comment from more diverse segments of the profession and the public. Professor Friedenthal attributed much of the perceived problem to insufficient Supreme Court involvement in the process as well as Committee redrafting after the time for reaction was passed. Professor Lesnick further advocated that the Advisory Committee be more diverse and that the Chief Justice's authority to appoint Committee members and establish procedures be reduced and decentralized. Professor Lesnick went so far as to suggest that the Court's role of "promulgating" the rules be eliminated to minimize conflicts of interest when the rules are later challenged in litigation.

421. See Burbank, *supra* note 415, at 1106–20.

This demonstration was, however, seemingly overlooked by the *Liberty Lobby* majority. Had the majority candidly acknowledged the opinion's major alteration of rule 56 in light of the commands of the Enabling Act, it should have realized that increasing the burden of the summary judgment nonmovant to require a demonstration of capacity to survive a directed verdict motion was a sharp departure from rule 56 understanding and practice as of 1986. A revision of a rule or statute is best accomplished by following accepted revision procedures. For the Federal Rules of Civil Procedure, these procedures are set forth in the Enabling Act. They may be implemented by the Court with relative ease should the Court believe a revision desirable. The *Liberty Lobby* majority made it quite clear that it viewed the equating of summary judgment and directed verdict as wise. What is unclear, even mystifying, is the Court's refusal to acknowledge its actions and its reluctance to seek to accomplish its goals through the Enabling Act.

The subterfuge of the *Liberty Lobby* opinion, whether accidental or intentional, vitiates many of the benefits presumed to flow from the Enabling Act. Since the Court acted as though it were merely declaring the law rather than altering it, the Act's process for ensuring heterogeneous contributions to rulemaking was regrettably missed. No one doubts that Supreme Court justices are intelligent. Some of them even have practical litigation experience, although few on the current Court can be said to have either the seasoned litigator's or the trial judge's exposure to day-to-day summary judgment practice and the consequences of any real or imagined litigation explosion. The Court has able law clerks and staff; it receives the benefit of the briefings and arguments of counsel in a hotly contested case such as *Liberty Lobby*. Nonetheless, these attributes fall far short of the contributions to rulemaking provided by the Enabling Act.

When rulemaking proceeds by Enabling Act process rather than judicial fiat, a substantially more diverse cast of characters participates. The Advisory Committee, although it has been rightfully criticized as being composed of too narrow and elite a segment of the profession,⁴²² has significantly greater experience and diversity to apply to the task. The Committee roster contains trial judges, appellate judges, practitioners, and law professors.⁴²³ This group has both more recent experience in litigation as well as greater interaction with the profession than the relatively isolated Supreme Court justices.⁴²⁴ Recently, the Committee Reporter has actively sought comments on amendment drafts from persons not on the Committee. The response,

422. See Lesnick, *supra* note 410, at 581.

423. For example, the Advisory Committee on the Federal Rules of Civil Procedure, as constituted May 1, 1986, was comprised of three law professors (Reporter Dean Paul D. Carrington of Duke University School of Law, Maurice Rosenberg of Columbia University School of Law, and Arthur R. Miller of Harvard Law School), four appellate judges (Joseph F. Weis of the Third Circuit, Frank M. Johnson of the Eleventh Circuit, Charles E. Wiggins of the Ninth Circuit, and Michael Zimmerman of the Utah Supreme Court), three district judges (John F. Grady of the Northern District of Illinois, Mariana R. Pfaelzer of the Southern District of California, and Walter Jay Skinner of the District of Massachusetts), a Justice Department lawyer (Dennis G. Lindner), and three private practitioners (W. Reece Bader of California, Arthur L. Liman of New York, and Larrine S. Holbrooke of Washington). The Deputy Director of the Administrative Office of the United States Courts, James Macklin, serves as Committee Secretary.

424. The justices must to some degree avoid too much mingling with the profession and the public, both to avoid questions as to their impartiality (*see* 28 U.S.C. § 455(a) (1982)) and because of their geographic concentration and isolation while having to manage a crushing workload that leaves little time for anything else but Court business.

particularly from law professors, has been significant though hardly massive.⁴²⁵ The Committee can expand this input substantially by holding public hearings and soliciting comment on an even wider scale. The Committee, to a much greater degree than the Court, has the capability to assemble and assess empirical information pertinent to the status of federal litigation and the impact of proposed rule changes.⁴²⁶

After this internal and external process, the Court has the opportunity to review the Committee product and further revise any rule changes. Comparing the information base available to the Court from the Committee with that presented to the Court in an isolated lawsuit underscores the advantages of revising rule 56 through the Enabling Act rather than through the *Liberty Lobby* opinion. Making the revisions by case law rather than formal amendment gives the Court the same opportunity to participate that it would have under the Act. Under the Act, however, the Court both proceeds against a richer information backdrop and is subject to congressional review.

The congressional review is key. Without it, there simply cannot exist the cross-section of views necessary to ensure that the rules sufficiently account for the interests of all segments of the profession and litigants. Under the current system, the Advisory Committee is appointed by the Chief Justice and neither the Committee nor the Court is required to heed suggestions from outsiders. Although congresspersons also possess a good deal of independence, they are generally subject to pressures likely to make them responsive to elements of the profession and public that may have been ignored or rejected in the Committee and Court process. Congresspersons must be re-elected. Even with the majority of seats, particularly House seats, considered the "safe" property of one political party,⁴²⁷ re-election normally requires the member and staff to at least listen to constituent groups. Thus, when rule amendments are reported to Congress via the Enabling Act, the plaintiff's bar, the defense bar, the insurance industry, subject matter interest groups such as the "civil rights lobby," state and local officials, and elites of the profession willing to press disagreements previously presented to the Advisory Committee may make their cases to the Congress.⁴²⁸ This serves the valuable function of expanding information as well as

425. For example, in response to requests from the Reporter, 22 persons, 18 of them law professors, made comments and suggestions to the Advisory Committee. See Advisory Committee, *Working Draft of Amendments to the Federal Rules of Civil Procedure* 225 (July 1987).

426. During the years of the Enabling Act, the committees have assembled data, usually court cases and commentary on them, but have created little or no data of their own. With proper planning, the committees could commission or themselves undertake to conduct empirical research concerning the actual impact of the Rules. Quasi-experimental data gathering could permit a comparison of the effects of different rules or versions of a rule. Armed with this additional data, the committees would presumably produce a better product, or at least a product whose ramifications can more accurately be predicted. Although the Federal Judicial Center frequently conducts studies on civil procedure, undoubtedly with an eye to items under Committee consideration, this outsider's view is that the Committee could work more directly with the Center in improving the information base upon which the Rules are built.

427. See generally M. BARONE & G. UFFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1982 (1981) (most Senate and House seats, particularly House seats, change upon retirement or death of incumbent); but see *id.* at xxvii-xxxiii (Republicans gain control of Senate in 1980 election as six Democratic incumbents defeated) and xxxviii (Republicans capture 37 House seats held by Democrats). See also F. SORAUF, *PARTY POLITICS IN AMERICA* 33-35, 140-60 (2d ed. 1972) (American identification with political parties, although not absolute, is highly stable, reducing turnover of elective posts).

428. For example, the plaintiffs' bar has access to Congress through the American Trial Lawyers' Association and various state trial lawyers' associations. By contrast, the current Advisory Committee seems to lack a member with a strong plaintiffs' attorney background in either personal injury or traditional plaintiffs' commercial work such as antitrust

the structural political objective of preventing rulemaking from becoming entirely the prerogative of a judicial "in group."⁴²⁹

In addition, many of the congresspersons and staff are non-lawyers, providing a substantially greater amount of lay input than can conceivably be achieved under the current Committee process, exclusively a lawyer's domain. Review in the legislature permits one final opportunity for those not steeped in legal groupthink to say "what about . . . ?" in response to the reported rules. The congressional perspective, although undoubtedly laced with its own self-interest and that of the most electorally powerful interest groups, nonetheless acts as a partial antidote to any self-interest or oversight of the profession or a segment of the profession unduly influential with the Committee or the Court.

When, for example, a perceived litigation explosion exists, is regarded as severe, and thought composed of a substantial number of unmeritorious cases, those adversely affected (such as judges facing more cases) are logically motivated to draft the rules in a manner that will make their lives easier, even at the expense of other participants in the system (such as certain classes of litigants). At a minimum, this tendency must exist on a subconscious level for Committee members and the Court. The congressional perspective will be somewhat different. The House and Senate will not have to work longer hours conducting trials if a summary judgment rule occasionally results in trials of claims that look unmeritorious in retrospect.⁴³⁰ This neutral, or least non-judicial, perspective is an important advantage of following rather than avoiding the Enabling Act. This and the other advantages of the Act were lost when the *Liberty Lobby* majority undertook to rewrite rule 56 on its own.

The foregoing is not to suggest that the Supreme Court lacks power to change, even change radically, its previous interpretation of a statute or the Constitution that it comes to view as erroneous or seriously flawed. Rather, this Article contends only that the Court must be candid in its interpretative conduct and should reinterpret a rule in a new and divergent manner only when it has a compelling basis for believing that its previous views were wrong. When the issue is doubtful or the Court is divided, the matter should be submitted to the Advisory Committee to begin the determination, pursuant to the Enabling Act, of whether an amendment is in order. Furthermore, this Article posits that radical rule re-interpretation should occur less

or shareholders' derivative suits. The insurance industry and the defense bar have similar organizations and can also approach Congress directly rather than attempting to catch the ear of the Committee indirectly. There are also various environmental groups, victims rights groups, and civil rights groups, such as the American Civil Liberties Union and the NAACP Legal Defense Fund, who are active in Congress. By contrast, those with avenues of communication to the Committee generally come from a different segment of the bar and its constituent interests, usually either large corporate law firms or prestigious law schools.

429. Professor Friedenthal contends that the Enabling Act is at its best because Congress does not have the primary responsibility for revising the Rules. He posits that the access by interest groups to Congress is likely to diminish the wisdom of any resulting rule drafted exclusively or primarily by Congress. See *Contemporary Crisis*, *supra* note 410, at 673-74. He does not, however, suggest that Congress is a bad supervisor, only that it is a poor drafter. My own view is that the access by interest groups and individual members of the electorate is vital, especially so in light of the essentially closed nature of the Committee and Court work to these groups.

430. Congress may have to fund more judges and support staffs to process any significant increase in litigation resulting from a particular rule, but this delayed and attenuated connection to a particular rule such as the hypothetically liberal summary judgment rule should not provide significant incentive for Congress to favor restrictive rules of procedure.

often than radical statutory or constitutional re-interpretation because the Court can itself amend a rule and need not effect substantial change through the less open process of reinterpretation.⁴³¹ The *Liberty Lobby* Court had within its grasp the ability to openly change rule 56 in a manner involving those with the affected reliance interest and with a delayed effective date during which the affected persons could adjust to the change but chose not to exercise this option.⁴³²

B. The Current Advisory Committee and Pretrial Disposition

The current Advisory Committee has responded to the Court's 1986 trio of cases, but has done so in a manner that exacerbates rather than alleviates their mischief. The Committee did not assemble convincing data suggesting substantial problems with traditional summary judgment jurisprudence and then proceed to address these shortcomings through amendments tailored to any demonstrated

431. Judicial reinterpretation without legislative revision obviously has a legitimate and important role in a common law system. For example, in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Court reversed a venerable previous interpretation of the Rules of Decision Act. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (interpreting what is now codified as 28 U.S.C. § 1652). On an issue over which first-year civil procedure students, lawyers, scholars, and judges continue to struggle, see generally, WRIGHT, *supra* note 17, §§ 54-60; Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974); Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974); McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965), the Court overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which held that federal courts sitting in diversity should apply federal common law as the substantive law governing the case. In *Erie*, the Court held that the federal court sitting in diversity must apply the substantive law of the state with the most apt choice of law nexus to the controversy. In *Erie*, which serves as a good example of the "right" approach to changing statutory interpretation (regardless of one's feelings about the wisdom of the *Erie* holding), the Court acknowledged that it was not only overruling a precedent but also altering its construction of the Rules of Decision Act. *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (1938). The Court then presented "new" historical evidence as to the meaning of the statute *Id.* at 72-73 (citing Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923)), and explained how the additional data changed the proper view of the statute. *Erie R.R. v. Tompkins*, 304 U.S. 64, 73-76 (1938). *Swift* held that the word "laws" as used in the Rules of Decision Act, 28 U.S.C. § 1652 (1982), which requires that the "laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply," referred only to state legislative enactments and not to state common law. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842). *Erie* agreed with Professor Warren's view that *Swift* had misinterpreted the Act and that ample evidence showed that Congress had in 1789 intended that "laws" as used in the Act include the judicial precedent of the states. The Court also presented constitutional and prudential problems posed by the *Swift v. Tyson* precedent and contended that these difficulties were resolved by the new statutory interpretation. *Erie R.R. v. Tompkins*, 304 U.S. 64, 74-78 (1938). For example, the *Erie* opinion pointed out that the *Swift* rule had allowed forum-shopping to the advantage of non-resident plaintiffs and to the detriment of residents of the forum state, and that *Swift* allowed for differing legal rules and decisions in the same locale depending upon whether the litigation was in state court or federal court, creating an equal protection problem.

In addition to presenting a forthright description of what it was doing and a detailed rationale of why, the *Erie* Court's action seems substantially more justified than that of the *Liberty Lobby* Court because of the nature of the law under re-interpretation. Rule 56 has the force of a statute but unlike a statute the process of revision can be instituted and shaped by the Court through the Enabling Act procedures. The Rules of Decision Act by contrast has been in its basic form since the Judiciary Act of 1789. The Act can only be amended by action initiated by Congress. Both rule 56 and 28 U.S.C. section 1652, as interpreted in *Swift v. Tyson*, had engendered substantial reliance in bench and bar. Changing the law or re-interpreting it in a manner tantamount to change surely would disturb to some extent these reliance interests. The *Erie* Court, however, took pains to explain and justify its disturbing of these interests.

432. The *Erie* Court, by contrast, faced a more difficult task in changing the legal landscape. Viewing *Swift v. Tyson* as greatly in error, the Court could have rendered the *Erie* decision as it did or used *Erie* merely to cast doubt on *Swift* and invite Congress to amend the Rules of the Decision Act to make state law the governing substantive law in diversity actions. If the *Erie* Court had chosen the latter course, it would have heightened rather than reduced the uncertainty of those who had relied on *Swift* and would have permitted this state of uncertainty to last as long as Congress failed to take the hint, perhaps forever. By instead rendering a strong and explained change in the interpretative meaning of § 1652, the *Erie* Court achieved a more predictable result. This is not to suggest, however, that the proper application of the *Erie* doctrine has always been clear or easy, quite the contrary (see WRIGHT, *supra* note 17, at §§ 55-60), only that the *Erie* rule itself was openly and plainly stated by the Court.

problem. Instead, the Committee has proposed massive revision of rules 56, 50, 40, and 12(b)(6) that adopt and arguably accentuate the approach to summary judgment taken by *Liberty Lobby* and *Matsushita*.

The Committee draft current as of this writing begins by abolishing the rule 12(b)(6) motion to dismiss for failure to state a claim. Instead, the new rule 12(b)(6) motion that would be available under the Committee proposal would be a motion asserting that the defendant is "entitled to judgment as a matter of law as provided in rule 56(a)." ⁴³³ Rule 50 motions as historically known are also eliminated and replaced by a shortened rule 50 that states only: "A motion for a directed verdict or a motion for judgment notwithstanding the verdict shall be treated as a motion for judgment as a matter of law and shall be decided in accordance with Rule 56." ⁴³⁴

The rule 56 to which litigants would be referred is not the rule 56 that the profession has lived with since 1938. The Committee has renamed it "Judgment As a Matter of Law" and proposes that the "heart" of summary judgment formerly contained in rule 56(c) be relocated to rule 56(a) and revised to read:

On motion, the court shall render judgment with respect to any claim, counterclaim, or cross-claim, if it finds that the moving party is entitled to judgment as a matter of law on established facts. In rendering judgment, the court shall establish the law and the material facts in conformity with Rule 40. ⁴³⁵

The remainder of the proposed amended rule 56 deals with primarily technical rather than substantive changes, except to the extent that it incorporates by reference the rather substantial revisions proposed in new rule 40. ⁴³⁶

The proposed amended rule 40 is in fact a new rule 40 that has essentially taken away from current rule 56(c) and 56(e) the task of defining and establishing the existence of a genuine issue of material fact. Current rule 40, dealing with assignment of cases for trial, would be eliminated and replaced by a rule devoted to "Establishment of Fact and Law." In particular, new rule 40(b) would explicitly confer upon a court authority to decide disputed fact questions prior to trial by providing:

To secure a just and inexpensive disposition of an action, the court may also at any time after the close of the pleadings establish facts on which the final decision on a claim, counterclaim or defense may depend. A fact may be established by the court only if there is no evidentiary basis on which the fact might be rejected by a reasonable trier of fact. ⁴³⁷

433. See Advisory Committee, *Amendments to Federal Rules of Civil Procedure* 27 (July 1987) [hereinafter July Draft]. The Advisory Committee Reporter has subsequently redrafted portions of the proposed amendments for the Committee's April 1988 meeting. Unless the subsequent pending draft differs in significant fashion from the July draft, this Article will cite to the relevant portions of the July draft.

434. *Id.* at 64-65.

435. *Id.* at 66-69.

436. *Id.* at 69-70. The proposed amended rule 56 expands the time available to respond to the motion for "judgment as a matter of law." The opposition would have 30 days (versus 10 under current rule 56(b)) to file and serve an opposition memorandum and supporting papers while the proponent would have seven days to reply (versus the current three days). Proposed amended rule 56(c) clarifies the language concerning conditional new trial motions made during the course of a court's ruling on a motion for judgment n.o.v. New rule 56(d) would specifically empower a reviewing appellate court to order a new trial even when that question was not presented to and decided by the trial court.

437. *Id.* at 38-39.

The remainder of rule 40(b) deals with the operational means by which these facts would be placed before a court for determination. Although these provisions might be termed largely technical or operational, they give context to the substantive change proposed by the Committee in adopting the "reasonable trier of fact" standard for summary judgment.

For example, proposed rule 40(b)(2)(B) provides that a movant seeking pretrial establishment of a fact may do so by affidavit or declaration "which reveals evidence which will be available for trial and which cannot be effectively contested."⁴³⁸ Rule 40(b)(2)(D) permits establishment of fact when the movant has produced "evidence presented at trial which was not genuinely contested."⁴³⁹ Rule 40(b)(5) states that "establishment of fact [under the Rule] shall be entered as an order of court, [and] shall be treated as a ruling on a question of law, and shall be modified only to prevent manifest injustice."⁴⁴⁰ In other words, rule 40(b)(1)'s admonition that a court establish fact only if there is *no* evidentiary basis for the fact to be rejected by a reasonable trier should not be taken literally. What the rule, read as a whole, and Committee Note suggest is that a court can establish facts when it is unpersuaded by the evidence offered in opposition to the alleged "fact."⁴⁴¹

The Committee Note states that new rule 40 is designed both to streamline trial and to curb to some extent the observed trend toward increased court requirements of fact pleading rather than notice pleading⁴⁴² and also to integrate rule 56 with rule 50 into "a single method of adjudication of cases without trial."⁴⁴³ The Committee Note further states that the "reasonable trier of fact" standard to be used in summary judgment decisions is "fundamentally the same" as the directed verdict and judgment n.o.v. standard as set forth in *Catrett* and *Galloway*.⁴⁴⁴ In other words, courts establishing fact for purposes of ruling on a rule 56 motion for judgment as a matter of law will be entitled to examine the nonmovant's evidence in opposition to the motion and decide whether it is sufficiently "substantial"⁴⁴⁵ and whether the

438. *Id.*

439. *Id.* at 40.

440. *Id.* at 41.

441. *Id.* at 71-73.

442. See Marcus, *supra* note 7, at 435. Professor Marcus argues that the evils of a return to fact-pleading can be avoided through more frequent and aggressive use of rule 56. Marcus begins by noting that summary judgment, unlike the rule 12(b)(6) motion, is a two-way street in which plaintiffs as well as defendants prevail, failing to note that, as an empirical matter summary judgment is primarily a defendant's tool. In addition, he approvingly cites *Matsushita* without closely analyzing the impact of the Court's approach to that case and the danger that courts applying *Matsushita-Liberty Lobby* summary judgment have as much opportunity to strike down disfavored claims as do judges subjecting complaints to a fact/code pleading analysis. Marcus correctly highlights the often overlooked or misguided use of rule 56(f), which permits postponement of the summary judgment decision to permit further nonmovant discovery. *Id.* at 484-91.

443. July Draft, *supra* note 433, at 72.

444. *Id.* at 42.

445. *Id.* at 43 (citing Cooper, *supra* note 323, at 955-68). The Advisory Committee Note's citation of Professor Cooper's article is puzzling in this context. To be sure, Cooper concludes that directed verdicts may be granted when the nonmovant offers no substantial evidence in support of its case, but he, like Professors Wright, Miller, and others, takes the view that in determining what is "substantial," the court must draw all inferences in favor of the nonmovant when the evidence or conclusions therefrom conflict. As discussed, this approach differs from the Court's concept of directed verdicts employed in *Liberty Lobby*. In addition, Professor Cooper displays in his analysis a respect for the benefits of jury trial (at least in certain situations) that seems absent from the Court's 1986 cases cited in the draft Advisory Committee Note. Cooper, however, in a portion of the article cited in the April 1988 Reporter's Draft, argues that "[f]ederal courts may legitimately accord greater factfinding and law applying freedom to juries in some areas than in

inferences made by nonmovants from the record are "sufficiently plausible that a trier of fact could base a finding or verdict on the inference."⁴⁴⁶

If the current Advisory Committee proposal is adopted, a court ruling on a summary judgment motion would be expressly permitted not merely to ascertain whether the parties' facts and suggested inferences are in conflict but would also be empowered to evaluate the facts and determine that the claimant's facts are insufficiently substantial or that the claimant's preferred inferences are insufficiently plausible to satisfy the judge. In essence, the proposed new Rules would expressly allow judges to weigh differing facts and inferences before trial according to whether the court thought facts were "effectively contested" or "genuine," the same semantic swamp that spawned the Court's 1986 summary judgment trilogy. The Committee proposes not to correct the problems raised by *Liberty Lobby*, *Matsushita*, and *Catrett* but to codify them.

As a check on judicial abuse of this expanded court authority and shift of power from juries to judges, the Committee relies on appellate review by providing that a court's fact and inference determinations be treated as questions of law subject to plenary review rather than questions of fact that can be set aside only if clearly erroneous. Yet the Committee then waters down this plenary review standard by stating that rule 40(b) pretrial fact determinations should be set aside only if necessary to avoid "manifest injustice." Reading between the lines, proposed amended rule 40(b) looks suspiciously like the clearly erroneous standard of review.⁴⁴⁷ It also assumes too much that is contrary to the realities of appellate review. Circuit courts undoubtedly perform a vital quality control supervisory power over district courts, but they are unlikely to vigorously re-examine the record below concerning a court's determination of fact despite any instruction of proposed amended rule 40. The trial determinations made may be matters of law, but they will come to the appellate court infused with fact-based determinations and a presumption of correctness that busy circuit courts are unlikely to examine anew and overturn in any but the most egregious of cases.

The Advisory Committee Note to proposed rule 56 also reveals the extent to which the Committee has adopted the rationale of *Liberty Lobby* that summary judgment and directed verdict are synonymous, citing as authority those who had advocated this change in the law.⁴⁴⁸ Unlike the reformers who sought to merge law and equity, establish discovery, and supplant code pleading with notice pleading, the

others, depending on the strength of the desire to keep pure the legal rules involved and on the nature of the consequences of jury error" without violating the seventh amendment. The Reporter's Note and cited authorities thus are ambiguous as to the power of judges and juries under the new rules. The profession has a right to ask exactly what the proposed amended rule 40 would do in reality. My own view is that adoption of the proposed amended rule would, because of the Court's recent pronouncements, be interpreted in an aggressive manner permitting too much judicial assessment of the weight of conflicting facts and inferences.

446. July Draft, *supra* note 433, at 44.

447. *Id.* at 47-48.

448. *Id.* at 71 (citing Sonenshein, *supra* note 18, and Currie, *supra* note 20). In the April 1988 draft, the Reporter's Note cites these authorities and concludes that the "several devices [of rule 12(b)(6), summary judgment, directed verdict and judgment n.o.v.] can be unified without change in the principles applied to the cases." For reasons previously stated, see *supra* text accompanying notes 80-328, this Article disagrees.

summary judgment revolutionaries prevailed without firing a legitimately debated "shot" in a conflict conducted under proper Enabling Act procedure; they won their victory through two Supreme Court decisions, one by a one-vote margin, with the rulemaking process following the Court rather than the other way around.

Certainly, some litigants who lose on summary judgment when they would have won had the matter proceeded to trial may be said to have received less justice under the new regime. In making policy and rules for the greater good of the aggregate federal civil litigation system, however, the participants (the Supreme Court, the profession, Congress, the public) are entitled to adopt rules permitting some individual injustices in the service of net gains to the system. If, for example, the *Liberty Lobby* summary judgment test resulted in few more "wrong" results (Type II errors) but substantially reduced the aggregate delay and cost attendant to litigation, it could defensibly be adopted.

Unfortunately, no one knows whether the new rule 56 will have any such minimal impact on accuracy. Similarly, no one knows how much time and money will be saved the system because of this bigger, stronger version of summary judgment.⁴⁴⁹ The nine justices of the Supreme Court, quite removed from daily trial court activities, ordinary litigation, and the public in general, are an especially ill-equipped group to conduct alone the cost-benefit analysis that should have preceded any substantial change in summary judgment jurisprudence. Revision through Enabling Act proceedings, coupled with extensive empirical study by the Federal Judicial Center and others, would produce a richer data base upon which to make the decision as to the future of rule 56.⁴⁵⁰ Rather than making this contribution

449. *Matsushita and Liberty Lobby*, by providing judges more discretion to evaluate evidence and dismiss claims, also will likely increase the number of directed verdict motions made by litigants, particularly defendants. The time-saving arguments made in favor of a stronger directed verdict rule are weaker than those raised on behalf of increased summary judgment. The directed verdict motion is made either after claimant's case-in-chief or at the close of all the evidence. Even in the former instance, the trial is well under way, with intense pretrial preparation and discovery already completed. Except in the largest cases, a grant of directed verdict at mid-trial will not save a large portion of judicial and litigant resources. A grant of directed verdict at the close of the evidence conserves even fewer resources. Granting the motion also entails the not insignificant risk of appellate reversal, which would necessitate a new trial and a net increase in time and costs. Consequently, most trial judges would lean toward denying all but the clearest directed verdict motion, allowing the jury to render a verdict resulting in a judgment less likely to be disturbed on appeal or that the judge can alter through grant of a motion for judgment n.o.v. or new trial.

The discussion of summary judgment as a time-saving device contained in McLauchlan's otherwise stimulating article misdefines the issue. McLauchlan elects to measure whether the motion saves time by comparing the elapsed time between filing of the complaint and final disposition of the case according to whether a summary judgment motion was made and finds the average case required 365 days for disposition while those with a summary judgment motion required approximately 240 days for disposition. See McLauchlan, *supra* note 322, at 454. This approach totally overlooks the proper measure of time-saving—whether the use of summary judgment reduces the judicial, counsel, or litigant hours spent in resolution of the case. For example, a case terminated 240 days after filing may have consumed 8,000 person hours and \$1 million. A case terminated after 365 days may have consumed 400 person hours and \$38,000. the length of time between filing and disposition bears no relation to the time and cost invested in a case. The earlier disposition of a matter does not necessarily free the court to consider another case, either, since open docket files vary in the extent to which they require court involvement during pretrial. A case "on the books" for six years may involve no more judicial time than one open for 180 days. In short, the limited available empirical data cannot support the purported time-saving nature and efficiency of a stronger summary judgment rule.

450. Earlier editions of the Advisory Committee have been persuasively criticized for taking no action to amend Federal Rule 15 concerning amendment of pleadings for nearly 20 years during which inconsistent interpretations, many arguably erroneous, mounted in the courts, culminating in the Supreme Court's arguably flawed pronouncement in *Schiavone v. Fortune*, 106 S. Ct. 2379 (1986). See Lewis, *The Excessive History of Federal Rule 15(c) and its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987). My criticism of current Advisory Committee intentions is,

to the profession, the Advisory Committee seems to have begun with the presumption that its task was merely to codify the Court's *fait accompli* in *Matsushita*, *Liberty Lobby*, and *Catrett*. My suggestion is that the Committee instead begin its summary judgment inquiry at dead center and independently determine whether summary judgment must "mirror" the directed verdict to be effective. My fear is that it is too late, that the Committee's inertia will continue to carry its ill-conceived suggestions forward, that the Court will report them, and that only strong congressional intervention, such as seen with the Federal Rules of Evidence, can avert a major mistake.

CONCLUSION

Marked restructuring of summary judgment doctrine nearly fifty years after its inception and three decades of settled construction is inherently risky business. To be properly done, the task should be performed with maximum information and public access,⁴⁵¹ following the procedures established for amendment of the Federal Rules pursuant to the Rules Enabling Act of 1934. Instead of taking this approach, the Supreme Court and the Advisory Committee seem committed to creating newer, tougher, more pro-defendant summary judgment and directed verdict rules as expeditiously as possible.

The criticisms set forth above of *Matsushita*, *Liberty Lobby*, and their ramifications are not intended as a prediction of "Apocalypse Soon" but rather as a call for correction and reflection. The Supreme Court and other federal courts can and should minimize the damage by taking a restrictive view of *Liberty Lobby*, limiting it insofar as possible to defamation actions and cases in which the trial judge has a high level of confidence based on the record in the accuracy of her conclusion that a nonmovant's case is so clearly unmeritorious that no reasonable factfinder would render a decision in its favor. In the meantime, the Advisory Committee should begin a serious examination of the comparative merits of traditional summary judgment doctrine as compared with *Liberty Lobby* summary judgment doctrine, including the

obviously, somewhat different. Professor Lewis faults the Committee for doing nothing in response to festering error and inconsistency in the lower courts while I criticize the Committee for doing too much in response to two Supreme Court decisions. Both problems perhaps stem from an insufficiently defined mission for the Committee. Rather than being frequently passive, waiting for key cases or waiting to hear proposals from parts of the profession, the Committee should perhaps be conducting more affirmative study and survey to determine what federal rules, if any, need amendment. A more passive stance probably means that only those with access to the elite Committee structure will have their voices heard. One group with substantial prestige, the Federal Courts Committee of the Association of the Bar of the City of New York, has proposed an alternative draft of amended rule 56 that does not alter the substantive heart of the rule because of its view that substantive revision of the rule is unwise until further decisional evolution is allowed to occur at a reasonable pace.

451. See Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 336 (1986) ("case-by-case development is the law's way of engaging in exploratory behavior—of discovering problems and trying out approaches to solve them. Codifying rules and statutes come later, after greater understanding has developed"). Accepting this approach, as did the Federal Courts Committee, one might ask why I suggest that the Advisory Committee do anything substantive at all. One could argue for a "wait-and-see" approach to the ramifications of *Matsushita* and *Liberty Lobby*. Unfortunately, matters have progressed too far to permit this approach. Both decisions were themselves not experimental but declaratory, leaving too little room for lower court departure from them. Furthermore, the Advisory Committee seems determined to rewrite rule 56 rather than leaving it intact so that the Court could gracefully pull back from *Matsushita* and *Liberty Lobby* on a case-by-case basis.

gathering of facts concerning any alleged savings of time and cost. The Committee should be a wise and courageous advisor to the Court rather than a mirror of unwise Court decisions. Only through this process can the judicial system's goals, including the currently trendy drive toward efficiency, be fully served.

As the story goes, a drunken man was seen on his hands and knees for some time. A passerby asked about his conduct. "I'm looking for my lost wallet," said the man. When asked why he continued to crawl about the lamp post after it became obvious his wallet was not there and why he had not looked elsewhere on the street, he replied "because the light is so much better here." Enlightened summary judgment doctrine requires the Advisory Committee and the profession to look behind and beyond the light reflected in the distorted mirror of *Matsushita*, and *Liberty Lobby*.

